Roy Adams on the Vast Potential of Ontario v. Fraser
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On April 29th the Supreme Court of Canada finally handed down its decision on the bargaining rights of Ontario farm workers. In Ontario (Attorney General) v. Fraser the court split 5-2-1-1. Lots of descriptions of the various opinions will no doubt soon appear on the web. This comment focuses almost entirely on the majority decision.

The majority overturned the decision of the Ontario Court of Appeal written by Ontario Chief Justice Warren Winkler. That court had ruled Ontario's Agricultural Employees Protection Act (AEPA) to be unconstitutional because it did not provide for union recognition based on "majoritarian exclusivity," the general principle found in labour relations acts across the country, and because it failed to specify a dispute resolution mechanism for disputes over contract negotiations and for the settlement of contract interpretation disputes and because it did not explicitly contain provisions requiring good faith bargaining.

In its Fraser decision, the Supreme Court found that Judge Winkler had gone too far in requiring the province to legislate the major provisions of the "Wagner Act Model" found in general private sector labour legislation across the country. The major deficiency that the majority found in the AEPA was the absence of a clause that explicitly requires agricultural employers confronted by "representations" made by an employee association to engage in a "good faith" process. The majority of the court "affirmed that bargaining activities protected by s. 2(d) [the Charter's freedom of association clause] in the labour relations context include good faith bargaining on important workplace issues..." which are "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." (para. 40). The majority went on to say that "One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters." (para 42).

In a previous blog article (posted on David Doorey's blog on November 25, 2010), I suggested that the court would come to this conclusion but I did not foresee the clever way that it found to remedy the problem. Paragraphs 5 (1) (5) (6) and (7) of the AEPA require the employer to "give an employees' association a reasonable opportunity to make representations" and also require that the employer respond orally or in writing to them. What the court said is that these provisions "do not expressly refer to a requirement that the employer consider employee representations in good faith. Nor do they rule it out. By implication, they include such a requirement." (101). Although I did not foresee this solution in my article "The Radical Potential of Dunmore," CLELJ, vol. 10, no. 1, 2003, I did say that: "It would be open to the Court to rule that, although collective bargaining as defined by the Wagner Act model is not a right of all Canadians, the party to whom representations are made [by non-statutory unions] has a constitutional responsibility to consider them in good faith with a view to reaching accommodation with the organization representing the employees." And further: "If, in order to make employee representations meaningful, employers are held to have a responsibility to listen to them and to respond in good faith, then, however it may be labelled in Canada, that nexus of

behaviour - which in ILO jurisprudence is a form of collective bargaining - is constitutionally guaranteed."

The AEPA created a Tribunal to hear disputes over interpretation of the Act. My reading of the majority decision is that the Tribunal is now required to assess any dispute about the operation of the relevant paragraphs against the bargaining in good faith guidelines outlined by the SCC in Health Services (2007). “Section 2(d),” the majority in Fraser said referring to Health Services, “requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make reasonable effort to arrive at an acceptable contract...” (41) Although in referring to the operative clauses in the AEPA 5(6) and (7), the majority conservatively said that “any ambiguity” should be “resolved by interpreting them as imposing a duty on agricultural employers to consider employee representations in good faith,” they also said (again referring to general principles established in Health Services) that 2(d) creates a “right to collective bargaining.” Although some employer-side law firms are making much of the phrase “consider employee representations in good faith,” I think that when read in its entirety the decision means that the government, through the Tribunal, must do more than require the employer to read demands “in good faith,” say “no” and move on.

The respondent UFCW was grievously offended by this decision and condemned it roundly. It wanted the Wagner Act Model and, in announcements since the decision, has repeated its intention to lobby the provincial government to put farm workers back under the general statute.

Despite this reticence by the primary union operating in Ontario agricultural to think creatively about this decision, its potential to shake up a torpid Canadian IR system is vast. In Dunmore (2001) the court made it clear that all Canadian workers have a right to form associations free from fear of reprisal. In Health Services it established that through those associations, workers have a right to make demands on employers and that governments have a constitutional responsibility to ensure that employers confronted with demands from legitimate associations recognize those worker organizations and enter into good faith negotiations with them over terms and conditions of work. In Fraser, the court made it clear that to exercise these rights, the associations do not have to seek certification as exclusive bargaining agents. Nor do they have to win the support of a majority of the relevant workers. These parameters are perfectly consistent with international human rights law as embodied in the international labour standards of the International Labour Organization- standards which the SCC (in Health Services and again in Fraser) said that all Canadian workers ought to be able to rely.

What the majority in Fraser did not address is the right to strike. Several provincial governments intervened in Fraser and their consistent message was that the Court was ill suited to deal with the details of labour legislation and should defer to legislatures. In his dissenting opinion, Judge Rothstein vigorously defended that perspective. The majority, I think that it is fair to say, heard that message loud and clear. I believe that Fraser, read in conjunction with Dunmore and Health Services, says to provincial governments that the ball is back in their court. They have an opportunity now to get it right. To do that they must develop policies that will deliver to all Canadian workers a “meaningful” right to organize and a “meaningful” right to bargain collectively. The court has also strongly indicated that those rights must be consistent with international law which means that the Wagner Model with its “majoritarian exclusivity” will not

get the job done. Insisting that unions attract a majority of the relevant workers in order to engage in good faith bargaining clearly offends international standards (on this see my article Adams, Roy J., "Fraser v. Ontario and international human rights," Canadian Labour and Employment Law Journal, 14 (3) 2009, pp. 377-392.)

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Barring a major reversal by the SCC (and that could happen given the 4-way split in Fraser and the likelihood that the just elected Conservative majority government will appoint labour unfriendly judges when openings occur), it seems to me that the labour relations issues raised in Dunmore, Health Services and Fraser will not get off the judicial agenda until provincial governments institute regimes that conform to international human rights standards. The world over, the main technique for ensuring that good faith bargaining is realized in practice is the right to strike (or for truly essential workers the right to arbitration). In international law, the right to strike is an essential element of the right to collective bargaining. In short, Ontario farm workers (indeed, all workers even those not represented by certified trade unions) have a right to strike that needs to be effectively protected by Canadian governments.

For Ontario farm workers how might that be done? One option would be for the provincial government to revise the AEPA to include, at the minimum, a right to strike. Instituting a right to arbitration, the solution recommended by a committee in the 1990s (and sought by the UFCW in its argument before Judge Winkler) would not be appropriate. Under international law farm workers have a right to strike. Taking it away by unilateral legislative action would offend that standard (again see my "Fraser v. Ontario and international human rights," noted above).

A better solution would be for the province to invite (under threat of the introduction of onerous legislation, perhaps) appropriate organizations of Ontario farmers and the UFCW to negotiate an agreement setting up a structure and process for constitutionally compliant negotiations and, even better, for negotiating conditions of employment applicable to all members of the Farmers' Association(s). International standards call on governments to encourage "most representative unions" and employers or employers' associations at the industry level to enter into such agreements. UFCW is certainly the "most representative" union in Ontario agriculture while there are more than one farmers' association that might work together.

International standards encourage "voluntarism." One pundit has opined that the application of that standard gives employers the license to bargain or not. It does not do that. What it does is go the government intervenors in Fraser one step further. Whereas they wanted the Supreme Court to defer to legislatures on labour relations matters, the international standards call on legislators to defer to the parties. To the greatest extent consistent with good public policy, employers and unions should be allowed, indeed encouraged, to negotiate their own bargaining structures and processes, so long as they are consistent with fundamental principles. That is what the international standards mean when they speak of "voluntarism."

I suspect that the Ontario government will not take this option. The agriculture minister has already said that the province has no intention of doing anything at this point. That stand almost certainly means more litigation. In the meantime, 80,000 farm workers are left with little say in determining the conditions under which they work. History suggests that despite the efforts of the Supreme Court to get legislators to recognize and act on their international human rights

obligations, without a concerted and appropriate effort on their behalf by an established union, Ontario farm workers will continue to be unable to exercise their fundamental human right and Charter right to bargain collectively.