

CEC Bulletin

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The Supreme Court of Canada Grants the CEC Leave to Intervene in the Fraser Appeal

On November 2, 2009, the Supreme Court of Canada granted the CEC the right to intervene in the *Fraser* appeal in order to make legal submissions on international labour principles and standards and comparative labour law. The hearing in the *Fraser* appeal will take place in Ottawa on December 17, 2009.

The *Fraser* case was commenced by the United Food and Commercial Workers Union (“UFCW”) in 2004 as a constitutional challenge to the exclusion of agricultural workers in Ontario from Ontario’s general collective bargaining statute, the *Labour Relations Act*. The primary issue in the *Fraser* case is the extent to which the activity of collective bargaining receives constitutional protection under the freedom of association guarantee in section 2(d) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”). The UFCW failed in the Ontario Superior Court of Justice but succeeded in the Ontario Court of Appeal

Before the Supreme Court of Canada, the Attorney General of Ontario and the Ontario Federation of Agriculture have challenged the Ontario Court of Appeal’s decision that the *Charter*’s freedom of association guarantee requires the Ontario Legislature to enact a collective bargaining statute applicable to agricultural workers that has the following four features:

1. A requirement that only one union selected by majoritarian vote represent workers on a farm (*i.e.*, majoritarian exclusivity);
2. A duty upon farmers and unions to bargain in good faith;
3. A mechanism to resolve bargaining impasses between a farmer and a union (*e.g.*, strikes/lockouts or binding arbitration); and

4. A mechanism to resolve disputes about the interpretation or administration of a collective agreement negotiated between a farmer and a union (e.g., grievance arbitration).

The *Fraser* appeal is of interest to all Canadian employers because if the Ontario Court of Appeal's decision is permitted to stand, then the four above-noted features of collective bargaining will effectively become constitutionalized. Should this occur, Parliament's and the legislatures' ability to adopt labour relations and collective bargaining systems that differ from the present North American model will be significantly impaired. Additionally, limits on collective bargaining that are presently found in Canada's labour relations statutes (including the exclusion of certain groups from statutory collective bargaining regimes) could be struck down by the courts as unconstitutional.

The importance of the *Fraser* appeal to collective bargaining and labour relations systems in Canada has attracted considerable interest. The Attorney General of Canada, and seven provincial Attorneys General (*i.e.*, all except Prince Edward Island and Manitoba) have chosen to participate in the appeal. In addition to the CEC, the Court has granted intervener status to four other groups opposing the UFCW: Federally Regulated Employers Transportation and Communications (FETCO), Conseil du patronat du Quebec Inc., Mounted Police Members' Legal Fund, and BC Business and British Columbia Agriculture Council. The Court has also granted intervener status to three groups that purport to represent workers and/or unions: Justicia for Migrant Workers and Industrial Accident Victims Group of Ontario, Canadian Labour Congress, and Canadian Police Association. All interveners, including the CEC, have been granted the right to file written submissions in the *Fraser* appeal not exceeding 10 pages in length. After the Court receives and reviews these written materials, it will decide which interveners, if any, will be permitted to make oral submissions to the Court at the hearing of the appeal.

The CEC's submissions to the Supreme Court of Canada in the *Fraser* appeal will focus exclusively on international and comparative labour issues. In fact, international labour principles and standards are very significant to the issues engaged in the *Fraser* appeal because the primary issue on appeal is the extent to which collective bargaining receives protection under the *Charter's* freedom of association guarantee. The Supreme Court of Canada has repeatedly held that Canada's international obligations should inform the interpretation of the *Charter*. We anticipate that the CEC will submit to the Court that the incidents of collective bargaining that the Ontario Court of Appeal ordered the Ontario Legislature to include in a collective bargaining statute applicable to agricultural workplaces (*i.e.*, majoritarian exclusivity, the duty to bargain in good faith, and mechanisms for resolving disputes during the term of the collective agreement and

bargaining impasses) are not required features of collective bargaining or freedom of association under international labour principles and standards and that the experiences of other advanced democracies bear this out.

Augustus Lilly and Stephen Penney, two partners of the St. John's office of the law firm Stewart McKelvey LLP, are representing the CEC in the *Fraser* appeal.