File no. 32968

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE ONTARIO COURT OF APPEAL)

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Respondent)

- and -

MICHAEL J. FRASER, on his own behalf and on behalf of the UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, XIN YUAN LIU, JULIA McGORMAN and BILLIE-JO CHURCH

RESPONDENTS
(Appellants)

- and -

ONTARIO FEDERATION OF AGRICULTURE

INTERVENER
(Intervener)

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ALBERTA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF QUEBEC, FEDERALLY REGULATED EMPLOYERS – TRANSPORTATION AND COMMUNICATIONS, CONSEIL DU PATRONAT DU QUÉBEC INC., MOUNTED POLICE MEMBERS' LEGAL FUND, CANADIAN EMPLOYERS COUNCIL, COALITION OF BC BUSINESS AND BRITISH COLUMBIA AGRICULTURE COUNCIL, JUSTICIA FOR MIGRANT WORKERS AND INDUSTRIAL ACCIDENT VICTIMS GROUP OF ONTARIO, CANADIAN LABOUR CONGRESS, CANADIAN POLICE ASSOCIATION AND CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE FEDERALLY REGULATED EMPLOYERS – TRANSPORTATION AND COMMUNICATIONS (FETCO)

(Rules 42 and 59 of the *Rules of the Supreme Court of Canada*)

Henri A. Lafortune Inc.
450 442-4080 – Tèl.
450 442-2040 – Fax
lafortune@factum.ca

2005 Limoges Street
Longueuil, Québec J4G 1C4
L-3248-09
www.halafortune.ca

FACTUM OF THE FEDERALLY REGULATED EMPLOYERS – TRANSPORTATION AND COMMUNICATIONS (FETCO)

(Rules 42, 59)

PART I

OVERVIEW OF FETCO'S POSITION STATEMENT OF FACTS

(a) Overview

1. This appeal is about whether the freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms*[1] imposes narrow and rigid limits on the ability of Canadian legislatures to adapt their labour laws according to their assessments of where and how to balance the interests of the public and of the different groups – employees, employers, unions – directly affected by those laws.

2. FETCO's submission is that this Honourable Court should not impose such limits. Instead it should follow its consistent precedents under the *Charter*. It should reaffirm the principle that legislatures, not courts, are best suited to the complex task of balancing the interests of differing parties within Canada's labour relations systems and adapting those systems to changing social and economic needs.

3. The Ontario Court of Appeal's decision at issue here is in clear conflict with that principle. That decision should therefore be overruled and the application judge's judgment upheld.

4. FETCO's submission is further that the federal sector governed by the *Canada Labour Code*[2] is especially vulnerable to the misinterpretation of this Honourable Court's case law on freedom of association in labour law found in the judgment under appeal. The court's reasoning there goes against recognizing the unique requirements of labour relations legislation in the transportation, communications and broadcasting sectors which are so crucial to social and economic life in Canada.

---

[1] *Canadian Charter of Rights and Freedoms*, s. 2(d), *Constitution Act 1983* being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (the *Charter*) (Book of Authorities of FETCO (hereunder B.A.F.), **Vol. I; Tab 2**).

[2] R.S.C. 1985, c.L-2 as am. (the *Code*) (B.A.F., **Vol. I, Tab 4**).

(b) The Facts

5. FETCO relies on the facts set out in the factums of the Attorney General of Ontario and the Ontario Federation of Agriculture. FETCO relies on the following facts as context for its submissions on the law.

6. FETCO's members between them employ a large majority of the federally regulated workforce coming under Part I – Industrial Relations of the *Code*. Some 212,000 of FETCO members' employees are unionized.

7. FETCO's members operate airlines, railways, ports, long haul trucking routes, telecommunications systems and broadcasting networks. Parliament has recognized these sectors as crucial to Canada's economic and social life. Parliament has thus passed legislation when needed to maintain FETCO members' operations in the public interest as determined by Parliament.[3]

8. Such legislation has as its essential features the ending of a strike or lockout lawful under Part I of the *Code* and the referral of issues unresolved in collective bargaining between the parties to an arbitrator or arbitration board empowered to impose the terms of a new collective agreement.[4]

9. Part I of the *Code* contains several features not typically found in Canadian labour legislation. These reflect the disproportionally important impact on Canada's economic and social life of work stoppages at FETCO members: their services are crucial and cannot be stockpiled in advance and in some cases (e.g. airport firefighting services) are needed on an emergency basis. The *Code* thus includes:

- Maintenance of operations provisions requiring that sufficient employees, as determined by the Canada Industrial Relations Board, work during a strike or

---

[3] *Railway Continuation Act*, 2007, S.C. 2007, c. 8 (B.A.F., **Vol. I, Tab 8**); *Postal Services Continuation Act*, 1997, S.C. 1997, c. 34 (B.A.F., **Vol. I, Tab 7**); *Maintenance of Railway Operations Act*, 1995, S.C. 1995, c. 6 (B.A.F., **Vol. I, Tab 5**); *West Coast Ports Operations Act*, 1994, S.C. 1994, c. 1 (B.A.F., **Vol. I, Tab 9**); *Postal Services Continuation Act*, 1991, S.C. 1991, c. 35 (B.A.F., **Vol. I, Tab 6**). See also *Air Traffic Control Services Continuation Act*, S.C. 1976-77, c. 57 (B.A.F., **Vol. I, Tab 1**).

[4] See, e.g. *Railway Continuation Act*, 2007, ss. 3, 10 & 14 (B.A.F., **Vol. I, Tab 8**); *Postal Services Continuation Act*, 1997, S.C. 1997, ss. 3, 8, 11 & 13 (B.A.F., **Vol. I, Tab 7**).

lockout to provide levels of service sufficient to avoid "immediate and serious danger" to public health or safety: *Code*, ss. 87.4, 87.5.

- Provisions for the continued loading and docking of grain vessels during labour disputes: *Code*, s. 87.7.

PART II

POSITION ON THE APPELLANT'S QUESTIONS

10. FETCO considers that the questions stated in paragraph 78 of the Appellant's Factum of August 18, 2009 dealing with freedom of association issues should be answered as the Appellant proposes. FETCO takes no position on the questions arising in this appeal under s. 15 of the *Charter*.

PART III

STATEMENT OF ARGUMENT

(a) Summary of Argument

11. The North American model of labour relations at issue in *Fraser* is exceptional in free and democratic societies. It requires that all employees in a state defined group, the bargaining unit, be represented by one union, whether or not they wish to be members of the union. This is in stark contrast to European systems where employees are free to choose their own union. Compulsory representation of employees by a union is in itself questionable under the *Charter*'s guarantee of freedom of association, particularly when coupled with statutory provisions allowing, as does s. 68(a) of the *Code*, compulsory membership in a specified trade union to be made a condition of employment.

12. In *Fraser*, the Ontario Court of Appeal has misapplied this Court's decisions in *Dunmore*[5] and *Health Services*[6] so as to constitutionalize the current statutory model of labour

---

[5] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (*Dunmore*) (B.A.F., **Vol. I, Tab 15**).

relations in Canada. The Ontario Court of Appeal mistakenly finds that the uniquely NorthAmerican statutory model of labour relations found in Canada is required by Canada's international obligations.

13. In fact, key provisions of Canadian labour statutes cannot be reconciled with the Court of Appeal's understanding of those obligations. Misapplication of this Court's decisions in *Health Services* and *Dunmore* such as found in *Fraser* can have uniquely serious consequences for federal sector labour relations, where the nature of FETCO members' operations has called for Parliament to protect the public interest in the maintenance of those operations during labour disputes.

(b) *Fraser* wrongly interprets this Court's case law to impose a particular statutory scheme as a Charter right

14. In *Fraser* the Ontario Court of Appeal imposed some elements common in the current Canadian model for labour relations statutes as the "minimum" required by the *Charter*[7] and imposed a positive duty on the Ontario legislature to enact a statutory scheme with those features: a statutory duty to bargain in good faith; a statutory monopoly of representation for the majority union; statutory mechanisms for resolving disputes on the interpretation of collective agreements or bargaining impasses.

15. As such, *Fraser* flies squarely in the face of this court's decision in *Health Services*, which held that collective bargaining rights protected by the *Charter* are limited to "a process", not any particular "substantive or economic outcome". The "process" protected is a general process of collective bargaining, not a particular model of labour relations or a specific bargaining method because, as this Court recognized, "it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years".[8] Peter Hogg correctly demonstrates the serious constitutional problems which arise from the type of

---

[6] *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 (*Health Services*) (B.A.F., **Vol. I, Tab 17**).

[7] *Fraser v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 481 at p. 499, para 80 (B.A.F., **Vol. I, Tab 16**).

[8] *Health Services, supra*, note 6 at pp. 443-444, para. 91 (B.A.F., **Vol. I, Tab 17**), see also pp. 416, 448, paras 29, 101; *Dunmore, supra*, note 5 at pp. 1077-1079, paras. 66-69 (B.A.F., **Vol. I, Tab 15**); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 1999 Can LII 649, at pp. 1006-1007, 1019-1022, paras. 11, 33, 35-37 (*Delisle*) (B.A.F., **Tab 14**).

interpretation of this Court's *Health Services* decision followed in *Fraser*, which would constitutionalize specific elements currently typical of Canadian labour relations statutes.[9]

16. Yet relying on the interpretation of this Court's decision in *Health Services* found in *Fraser*, unions representing a substantial part of the federal public service workforce are now seeking to have the courts declare parts of the statute implementing the 2009-10 federal budget to be contrary to the *Charter* because they place caps on pay in the public service.[10]

17. In *Health Services, Dunmore* and *Delisle* this Court continued its well established reasoning which recognizes that the *Charter* should not be used to substitute the courts for the legislatures in the task of crafting labour relations statutes and policies.[11]

18. The decision in *Fraser*, with respect, contrasts directly with the soundness of this Court's approach. The reasoning in *Fraser* establishes *Charter* rights to some, but not all, of the features of current Canadian labour relations statutes for some, but *not all*, employees in Canada.[12] In doing so *Fraser* mistakes the *Charter* freedom to associate in order to bargain collectively for a *Charter* right to the current statutory frameworks for collective bargaining. This error raises a host of problems, a few of which we illustrate below.

19. First, *Fraser* gives constitutional status to only parts of the current statutory model of collective labour relations found in Canada. These schemes, though, are conceived as a statutory whole by legislatures which are aware that changes to one part of the scheme can affect the desired balance of that whole. The constitutional status of one part of a labour relations scheme will profoundly affect the legislature's ability to adapt the rest of it to changing public policy.

20. Second, *Fraser* would create a patchwork of *Charter* entitlements to specific statutory rights in labour relations legislation which would vary according to a court's estimation of the

---

[9] P.W. Hogg: *Constitutional Law of Canada,* 4th ed. (Carswell: Aurora 2007) (looseleaf, updated to 2008) pp. 44-6 to 44-10 (B.A.F., **Vol. II, Tab 27**).

[10] *Professional Institute of the Public Service of Canada et al v. Canada (Attorney General)* (Ontario S.C. file No. CV-09-375977, April 6, 2009)) (B.A.F., **Vol. I, Tab 18**); *Public Service Alliance of Canada et al v. Attorney General of Canada* (Ontario S.C. file No. CV-09-377318, April 27, 2009) (B.A.F., **Vol. I, Tab 19**).

[11] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at pp. 390-92, 409-20 (B.A.F., **Vol. II, Tab 21**); *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 at pp. 301-305, 313-315, paras. 156-161, 180-182 (B.A.F., **Vol. I, Tab 20**); See also *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, at pp. 481-83 (Dickson C.J. dissenting, but not on this point) (B.A.F., **Vol. II, Tab 22**).

[12] *Fraser, supra*, note 7, at p. 499, paras. 79-80 (B.A.F., **Vol. I, Tab 16**).

"vulnerability" of given employees. Successor rights provisions, for example, might be a constitutional imperative on the reasoning in *Fraser* in some industries, but not in others. Statutory provisions permitting union shop clauses in collective agreements[13] – which compel all employees in a bargaining unit to become union members – could be permissible in some industries, but not in others.

21. *Fraser* thus invites, indeed requires, court setting of the details of labour relations statutes. *Fraser* itself, for example, quite explicitly states that legislation exempting farms with less than a certain number of employees from the collective bargaining scheme imposed in the decision would likely be justifiable under s. 1 of the *Charter*.[14] Under the approach in *Fraser*, courts could inevitably be required to subject any feature of a labour relations statute undergoing a *Charter* challenge to a similarly detailed analysis.

(c) *Fraser's* mistaken reliance on international labour law

22. Key to the reasoning in *Fraser*'s are errors in understanding Canada's international labour law obligations and in failing to grasp the highly anomalous nature of the labour relations system currently found in Canada.[15] It is simply not correct to say that international labour law requires a constitutionalization of the North American model of labour relations. Its key features contradict the understanding of freedom of association found in virtually all other free and democratic societies.

23. As this court has held in *Health Services*, Canada has obligations only under International Labour Organization (ILO) Convention 87, *Freedom of Association and the Right to Organize* (B.A.F., **Vol. I, Tab 11**), not under ILO Convention 98, *Right to Organize and the Collective Bargaining* (B.A.F., **Vol. I, Tab 12**). This is because Canada has signed Convention 87, but has not signed Convention 98.

24. Article 19 of the ILO's Constitution, article 15(1) of Convention 87 and article 8(1) of Convention 98 all clearly establish that ILO member states are only bound by conventions they have ratified.[16]

---

[13] Found in, for example, *Code*, s. 68(a).
[14] *Fraser, supra*, note 7, at pp. 511-512, paras. 133-135 (B.A.F., **Vol. I, Tab 16**).
[15] *Fraser, supra*, note 7, at pp. 499-502, paras. 80-93 (B.A.F., **Vol. I, Tab 16**).
[16] As the ILO itself points out, its "Declaration on Fundamental Principles and Rights at Work" of 1998, which refers to freedom of association and a right to collective bargaining, does not create any legal

25. The rights protected in these two conventions are quite distinct. Put succinctly, Convention 87 protects the right of employees and employers to form voluntary organizations independent of state control and not to suffer retaliation for doing so. Convention 98 protects substantive features of *voluntary* collective bargaining between employees and employers, including proportional representation of unions and safeguarding employees from compulsory union membership.[17]

26. But the essential features of Canada's statutory labour relations schemes are largely a negation of the rights set out in Convention 98. Taking those held in *Fraser* to be required by the *Charter*, a state imposed (statutory) duty to bargain is contrary to the *voluntary* nature of collective bargaining required by Convention 98; state imposed exclusive representation rights are contrary to Convention 98 save in narrow circumstances, and state imposed mechanisms for resolving bargaining impasses are contrary to Convention 98.[18]

27. Such contradictions are not surprising when it is recalled that the essential features of Canada's statutory labour relations schemes are anomalous among free and democratic societies. They are found only in Canada and the United States, where the American *Wagner Act* model has been adopted.[19] Thus, for example, the formerly widespread provision in Canadian labour relations statutes (still found in the *Code*[20]) which permitted unions to be certified as exclusive bargaining agents without a vote, is condemned by the ILO in the clearest possible terms in comments on Convention 98:

> "When national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a

---

obligations for member states: International Labour Conference, 86th Session, June 1998, "Report of the Committee on the Declaration of Principles", at par. 325 (B.A.F., **Vol. II, Tab 29**).

17 ILO: *General Survey 1994, Freedom of association and collective bargaining*, paras 199, 201 (B.A.F., **Vol. II, Tab 28**); D. Campbell (ed): *International Employment Law*, Vol. I at para 5 [3] (B.A.F., **Vol. II, Tab 24**); *Collymore v. A.G., Trinidad & Tobago*, [1970] A.C. 538 at 546-548 (B.A.F., **Vol. I, Tab 13**); B. Langille: "Can we rely on the ILO?" (2008), 13 C.L.E.L.J. 273 at 290-291, 297-299 (B.A.F., **Vol. II, Tab 31**).

18 *Fraser, supra*, note 7, p. 499 at para. 80 (B.A.F., **Vol. I, Tab 16**); B. Gernigon, A. Odero and H. Guido: "ILO principles concerning collective bargaining" 139 *International Labour Review* (2000), No. 1, at pp. 38, 40-43, 51-52, paras I, J. (B.A.F., **Vol. II, Tab 25**)

19 *Infra*, note 22).

20 *Code, ss.* 17, 24 (B.A.F., **Vol. I, Tab 4**); *Canada Industrial Relations Board Regulations 2001*, SOR/2001-520, ss. 30-32 (B.A.F., **Vol. I, Tab 3**).

> majority vote of the employees in the unit concerned; (c) [I]f no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members."[21] (emphasis added)

28. What *Fraser* would constitutionalize as a "minimum" for Canadian labour relations statutes is thus not a consensus among free and democratic societies, but an 80 year old American solution to the embittered labour relations in that country in the generation preceding the 1930's.[22] Labour relations statutes based on the concept of a single union having a state imposed monopoly on collective bargaining for a state defined group of employees, to take but one of the peculiarities of Canadian labour statutes which *Fraser* finds to be a constitutional imperative, are not to be found among free and democratic societies outside Canada and the United States.[23]

29. The use *Fraser* makes of ILO Conventions as a yardstick for determining whether a Canadian labour statute is compatible with the *Charter* is thus ill conceived and has led the Ontario Court of Appeal into error.

(d) The *Fraser* approach goes against the necessary legislative recognition of unique features of federal labour relations

30. The industries coming under federal legislative jurisdiction and regulated by Part I of the *Code* have a unique place in Canada's social and economic landscape. They are almost all service industries whose "products" cannot be stockpiled. Prolonged interruption of these services has serious consequences for Canada's economic and social life. Under Canada's constitution, it is Parliament which has been entrusted with responsibility to determine what levels of these services must be maintained in the public interest.

31. This is one of Parliament's most important constitutional functions: acting to safeguard the Canadian public from actions which imperil its health or safety or put at risk the maintenance of operations key to Canada's economic and social life. This Court should thus make it clear that

---

[21] ILO: *General Survey Freedom of Association and Collective Bargaining* 1994, paras. 240-241 (B.A.F., **Vol. II, Tab 28**).

[22] Historical background to the *Wagner Act*: John E. Higgins, Jr.: *The Developing Labor Law* (5th ed.), Vol. I, pp. 8-34 (American Bar Association, Labor and Employment Law Section: BNA Books, Washington, D.C. 2006) (B.A.F., **Vol. II, Tab 26**).

[23] W.L. Keller and T.J. Darby (eds) : *International Labor and Employment Laws*, Vol. I, 2nd ed. (American Bar Association, Labor and Employment Law Section: BNA Books, Washington, D.C. 2003), (with annual supplements), chapters on e.g. France, pp. 4-30 to 4-51; Germany, pp. 5-40 to 5-59; Italy, pp. 6-39 to 6-62; United Kingdom, pp. 8-59 to 8-89 (B.A.F., **Vol. II, Tab 30**).

its decision in *Health Services* cannot be interpreted as an abrogation of that Parliamentary duty and power.

32. This unique legislative regime, and the knowledge of both employers and unions governed by the *Canada Labour Code*, that the public interest may require a certain level of service at all times or a speedy end to strikes or lockouts and settlement of a collective agreement using interest arbitration, is broadly accepted in the federal labour relations community[24]. As such, the legislative regime in the *Code* and this background of collective bargaining in the federal sectors are excellent examples of the advantage noted by Professor Paul Weiler that Canadian labour law enjoys because of the autonomy each jurisdiction has under the constitution to adapt its labour laws to its particular needs.[25]

33. The approach found in *Fraser* to this Court's case law on freedom of association[26] in the labour law area puts this advantage at risk. It does so by allowing the use of the *Charter* to impose uniformity in labour legislation, overriding the constitutional division of powers. Both practically and constitutionally, this is an erroneous and undesirable application of this Court's decisions.

Conclusion

34. *Fraser's* erroneous interpretation of this Court's decisions on freedom of association under the *Charter* poses two interrelated problems of particular concern for labour law in the federal sector. First is the imposition of some parts of current Canadian statutory labour relations schemes as constitutional imperatives. This clear invitation to litigate the constitutionality of detailed features of labour relations statutes is already being taken up. Second is the imposition of a uniformity in Canadian labour law ill-adapted to the diversity of Canadian economic and social life or the particular circumstances of the industries under federal labour law jurisdiction.

35. For these reasons and those set out in the factums of Attorney General of Ontario and of the Ontario Federation of Agriculture, FETCO submits that this appeal ought to be allowed.

---

[24] A. Sims, R. Blouin, P. Knopf: *Seeking a Balance: Canada Labour Code, Part I,* Ottawa: Minister of Public Works, 1995, pp. 151-163 (B.A.F., **Vol. II, Tab 32**).

[25] P. Weiler: *Reconcilable Differences* (Carswell: Toronto, 1980), at pp. 9-11 (B.A.F., (B.A.F., **Vol. II, Tab 33**). An example of this very problem is the Alberta Relations Board decision that the *Charter* requires Alberta to include the so-called Rand formula in its labour relations legislation: *UFCW, Local 401 and Old Dutch Foods Ltd.*, November 9, 2009 (B.A.F., **Vol. II, Tab 23**).

[26] Cases cited *supra*, notes 8, 11.

PART IV

SUBMISSIONS ON COSTS

36. FETCO submits that no costs should be awarded in connection with its intervention in any event of the cause.

PART V

FETCO'S POSITION ON THE DISPOSITION OF THE LEGAL ISSUES AND SUBMISSIONS ON ORAL ARGUMENT

37. FETCO submits that the appeal should be allowed as the reasoning of the application judge concerning ss. 2(d) and 1 of the *Charter* is substantially correct. FETCO takes no position on the issues before this Honourable Court concerning s. 15 of the *Charter*.

38. FETCO requests permission to make oral argument not exceeding 10 minutes on the matters addressed in this factum because of the fundamental importance for Canadian labour law of the issues in this appeal.

DATED at Montreal, Quebec, this 20th day of November, 2009.

Roy L. Heenan/Thomas Brady
Heenan Blaikie LLP
Counsel for the
Federally Regulated Employers –
Transportation and Communications
(FETCO)

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**