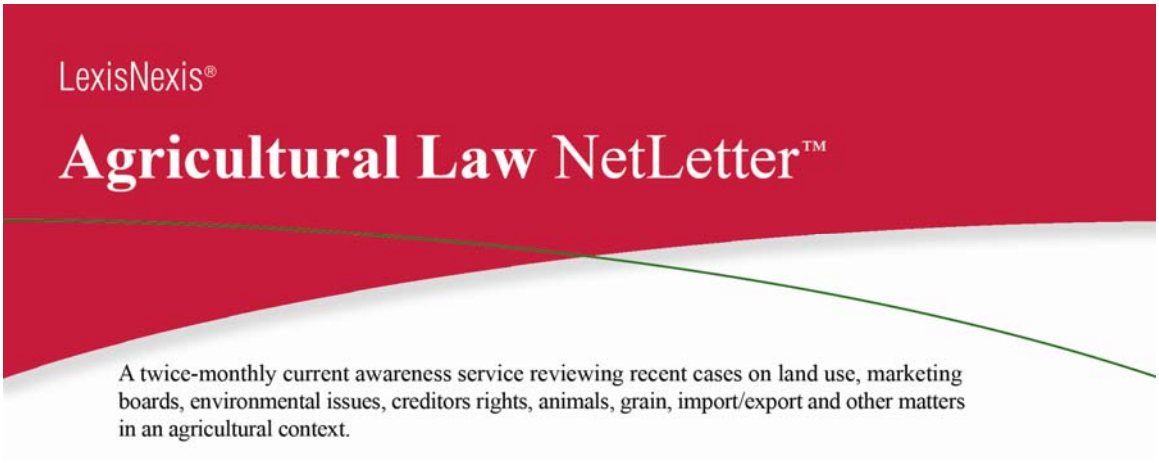

Thursday, May 5, 2011 - Issue 225

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The majority of the Supreme Court of Canada has held that the Agricultural Employees Protection Act (Ontario) which excluded Ontario farm workers from the Labour Relations Act (Ontario) and created a different labour relations regime in Ontario for farm workers, was constitutionally valid, and did not violate farm workers' right of freedom of association, or equality rights, protected under s. 2(d) and 15 of the Canadian Charter of Rights and Freedoms. The Act allows farm workers form associations and make representations through their associations to employers, with an additional right to have disputes heard and decided by a tribunal. The Supreme Court overturned a 2008 decision of the Ontario Court of Appeal which concluded that the Act was unconstitutional. (Ontario (Attorney General) v. Fraser, CALN/2011-016, [2011] S.C.J. No. 20, Supreme Court of Canada)

**** NEW CASE LAW ****

Ontario (Attorney General) v. Fraser; CALN/2011-016, Full text: [2011] S.C.J. No. 20; 2011 SCC 20, Supreme Court of Canada, McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella,, Charron, Rothstein and Cromwell JJ. April 29, 2011.

Employment Law -- Agricultural Workers -- Right to Organize -- Equality Rights.

Prior to 1994, Ontario farm workers had been excluded from the general labour relations regime under the Labour Relations Act (Ontario).

In 1994, the Ontario Legislature enacted the Agricultural Labour Relations Act which extended trade union and collective bargaining rights to agricultural workers.

A year later, the Legislature repealed this Act in its entirety and again excluded farm workers from the labour relations regime, in the Labour Relations and Employment Statute Law Amendment Act. This Act was challenged on the basis that it infringed on

the guarantees of freedom of association under s. 2(d) and equality under s. 15 of the Charter. In Dunmore v. Ontario (Attorney General), 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, the Supreme Court concluded that this Act did violate s. 2(d) of the Canadian Charter of Rights and Freedoms.

In 2002, the Ontario Legislature enacted the Agricultural Employees Protection Act, 2002 (the "AEPA").

The AEPA excluded farm workers from the Labour Relations Act (Ontario) but created a labour relations regime for farm workers in Ontario including the right to form and join in an employee's association; the right to participate in its activities and to assemble, make representations to their employers through the association on terms and conditions of employment; and the right to be protected against interference, coercion and discrimination in the exercise of these rights. The employer had to give associations the opportunity to make representations respecting terms and conditions of employment and to listen to these representations or read them. A tribunal was created for the hearing and deciding disputes.

The constitutional validity of the Act was challenged. Farley, J. dismissed the application [see discussion of his decision at para. 13 and 14].

The Ontario Court of Appeal (2008 ONCA 760 (CanLII), 2008 ONCA 760, 92 O.R. (3d) 481) allowed the appeal and declared the Act to be constitutionally invalid on the grounds that it substantially impaired the ability of agricultural workers to meaningfully exercise the right to bargain collectively under s. 2(d) of the Charter [at para. 15 and 16].

This decision was appealed to the Attorney General of Ontario to the Supreme Court of Canada.

Decision: The Supreme Court of Canada, McLachlin, C.J. and LeBel, J. (Binnie, Fish and Cromwell, JJ. concurring); Rothstein, J. (Charon, J. concurring (concurring in the result)); and Deschamps, J. (concurring in the result); Abella, J. dissenting, allowed the appeal, held that the AEPA did not infringe s. 2(d) or 15 of the Charter, and dismissed the action [at para. 118].

A complete review of this complex 88 page decision is beyond the scope of this Netletter.

With respect to the AEPA, McLachlin, C.J. and LeBel, J. concluded:

(a) That the Act did not breach the protection of freedom of association under s. 2(d) of the Charter.

They concluded [at para. 98] that if the AEPA:

> "[98] .viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the Charter will have been limited, and the law found to be unconstitutional in the absence of justification under s. 1 of the

> Charter. The onus is on the farm workers to establish that the AEPA interferes with their s. 2(d) right to associate in this way."

They then concluded following a discussion of the AEPA and its presumed intention [at para. 99 to 106], that [at para. 107] of the AEPA:

> ".correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that s. 5 of the AEPA does not violate s. 2(d) of the Charter."

With respect to the issue of whether or not employers have refused to recognize the rights of association of farm workers, and have refused to meet or bargain with them, McLachlin, C.J. and LeBel, J. observed the violation of the right of the association under s. 2(d) was not established, and that the union had not made a significant attempt to make it work. The process under the Act had not been "fully explored and tested". The Act did contemplate a "meaningful exercise of the right of association, and provided a tribunal for the resolution of disputes" [at para. 109].

(b) That the AEPA did not deprive farm workers of their equality rights under s. 15 of the Charter.

McLachlin, C.J. and LeBel, J. concluded that this claim was premature stating, at para. 116:

> "[116] The s. 15 discrimination claim, like the s. 2(d) claim, cannot succeed on the record before us. It is clear that the regime established by the AEPA does not provide all the protections that the LRA extends to many other workers. However, a formal legislative distinction does not establish discrimination under s. 15. What s. 15 contemplates is substantive discrimination, that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage: Andrews v. Law Society of British Columjbia, 1989 CanLII 2 (S.C.C.), [1989] 1 S.C.R. 143; R. v. Kapp, 2008 SCC 41 (CanLII), 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. The AEPA provides a special labour regime for agricultural workers. However, on the record before us, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature."

** CREDITS **

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