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Canada Update: February 2011 through April 2011 Highlights of Significant Court Cases Abroad

*Soji John**

THIS update of the Canada Reporter will consider two cases, *Bou Malhab v. Diffusion Métromédia CMR, Inc.* and *Ontario (Att'y Gen.) v. Fraser.* In *Bou Malhab*, the Supreme Court of Canada found that the appellants had not proven their case for damages in a class action suit for defamation. In its analysis, the court expounded on factors to consider when analyzing the injury element in defamation suits. In *Fraser*, the Supreme Court of Canada analyzed the constitutionality of Ontario's Agricultural Employee's Protection Act, finding that it meets the requirements of good faith and collective bargaining to preserve freedom of association under section 2(d) of the Charter of Human Rights and Freedoms, supporting its decision in *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia. Fraser* both clarifies the court's understanding of *Health Services* and exemplifies some remaining contentions.

I. *BOU MALHAB V. DIFFUSION MÉTROMÉDIA* CMR, INC.–DIFFICULTY IN PROVING INJURY FROM DEFAMATION WITH A DIVERSE CLASS

Almost a decade after Montreal cab drivers were verbally assailed on public radio, the Supreme Court of Canada found that Bou Malhab, the lead plaintiff in a class action defamation suit brought by Quebec taxi drivers, had not shown that each member of the class had sustained an injury and, as a result, was not entitled to class action damages.[1] In *Bou Malhab v. Diffusion Métromédia CMR, Inc.*, J. Deschamps, writing for the majority, expounded on a non-exhaustive set of six factors to consider

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* Juris Doctor, SMU Dedman School of Law 2011. This is Mr. John's last update as Canada Reporter. He wishes to thank the editorial staff of the Law and Business Review of the Americas, in particular Mr. Octavio Dominguez and Mr. Alexander Farr. As he passes responsibility to Ms. Dorothy Tran, he wishes her the best of luck.

1. Alysia Lau, *Bou Malhab v. Diffusion Métromédia: SCC Finds "No Ordinary Person" Would Believe Reputation of "Nigger"-Speaking Arab and Haitian Taxi Drivers was Damaged. Who is the Ordinary Person?*, THE CT. (Mar. 2, 2011) http://www.thecourt.ca/2011/03/02/bou-malhab-v-diffusion-metromedia-scc-finds-no-ordinary-person-would-believe-reputation-of-nigger-speaking-arab-and-haitian-taxi-drivers-was-damaged-who-is-the-ordinary-person/.

in determining whether each individual member in the class had suffered an injury.[2] In its analysis, the court considered defamation, in particular, the injury element, under Quebec civil law as well as in common law jurisdictions, such as England and Canada, finding that the ordinary person standard is the appropriate gauge in analyzing injury.[3] Under the set of six factors, the court found that the plaintiffs had not proven a cognizable injury and upheld the ruling of the appellate court, which overturned a damage award at the trial level.[4] Because of the similarity between civil and common law jurisdictions, *Bou Malhab* becomes important in considering whether a plaintiff will be able to show sufficient injury for each member of the class in order to seek damages, or if he would have a better case by bringing an individual suit and joining distinct members.[5]

A. Background

In November of 1988, André Arthur, a radio show host, made derogatory comments against Montreal taxi drivers, particularly those of Arabic and Haitian descent.[6] These comments included statements such as, "[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that's French and English? . . . I'm not very good at speaking 'nigger' . . . [T]axis have really become the Third World of public transportation in Montreal . . ."[7] On behalf of Montreal taxi drivers whose "mother tongue is Arabic or Creole," Mr. Bou Malhab, a taxi driver of Arabic descent brought a class action suit for defamation against Diffusion Métromédia, CMR Inc., which operated the radio station where Mr. Arthur hosted his show.[8] The Superior Court, on remand from the appellate court and after originally refusing to certify a class, found Mr. Arthur's remarks to be "racist, defamatory, and wrongful."[9] The court granted damages of roughly $CAD 200,000 payable to "a nonprofit organization representing taxi drivers."[10] The Quebec Court of Appeals overturned the verdict, finding that the plaintiffs could not show individual injury required to obtain a damage award.[11]

2. *Id.*
3. Farès Bou Malhab v. Diffusion Métromédia, [2011] S.C.C. 9 ¶¶ 22-42 (Can.).
4. *Id.* ¶¶ 1-2, 94.
5. *See* Lau, *supra* note 1.
6. *See* Lau, *supra* note 1.
7. *Bou Malhab*, [2011] S.C.C. 9, ¶ 3.
8. *Id.* ¶ 2.
9. Hugh Tomlinson, *Case Law: Bou Malhab v. Diffusion Metromedia CMR Inc.–Group Libel in Canada*, Inforrm's Blog, (Feb. 23, 2011) http://inforrm.wordpress.com/2011/02/23/case-law-bou-malhab-v-diffusion-metromedia-cmr-inc-group-libel-in-canada/.
10. *Id.*
11. *Id.*

B. Majority Opinion at the Supreme Court of Canada

The Supreme Court of Canada reviewed the elements of defamation under Quebec civil law, which requires a showing of "fault, injury, and a causal connection" between the two.[12] Because the respondents had conceded fault, the court focused its analysis on the injury element.[13] In particular, the majority emphasized the use of an objective standard in the analysis of injury applicable "in both civil and common law systems."[14] The court stressed that the analysis must consider not whether *the plaintiffs* considered themselves injured, but whether from the viewpoint of an "*ordinary person*," the remarks by the defendant, "when viewed as a whole, brought discredit on the reputation of the victim."[15] Moreover, the court indicated that regardless of whether a defamation charge is brought as a class action or as an individual or joint action, the injury element must be personally felt by all plaintiffs to the suit—as required by the Code of Civil Procedure in bringing an action, the Quebec Charter in protecting reputation as a personal right, and the Civil Code of Quebec in compensating only personal injury.[16]

The majority proposed six factors to consider to assess whether the plaintiffs were personally injured.[17] These included: (1) "the size of the group;" (2) "the nature of the group;" (3) "the plaintiff's relationship with the group;" (4) "the real target of defamation;" (5) "the seriousness or extravagance of the allegations;" (6) "the plausibility of the statements and their tendency to be accepted;" and any "extrinsic factors."[18] Most notably, a large-sized group does not necessarily preclude showing injury; although it is more difficult for "each member [to] feel affected" as size increases, it is considered along with other factors, especially the nature of the group.[19] But as size increases, it is easier for a group to become increasingly heterogeneous, such that "imputing a single characteristic to all member[s] of . . . [the group] . . . would make an allegation of personal injury implausible."[20] As a further consideration, when the defamation relates to the plaintiff's status within a group or when the plaintiff is a well-known member within the group, it is easier to establish a personal injury.[21] The court also discussed that even when the true target of the defamation is a subset of the group, if the ordinary person associates the defamation with the entire group, the group as a whole could suffer injury.[22] But a diffused prejudice is insufficient; there must be a cognizable

12. *Bou Malhab*, [2011] S.C.C. 9, ¶ 22.
13. *See generally Bou Malhab*, [2011] S.C.C. 9, ¶ 9.
14. Tomlinson, *supra* note 9.
15. *Bou Malhab*, [2011] S.C.C. 9, ¶ 79 (emphasis added).
16. *See id.* ¶¶ 45-47.
17. Tomlinson, *supra* note 9.
18. *Id.*
19. *Bou Malhab*, [2011] S.C.C. 9, ¶¶ 57, 62, 64.
20. *See id.* ¶ 66.
21. *Id.* ¶¶ 69-70.
22. *Id.* ¶ 72.

injury to all members that form the class.[23]

In considering the seriousness or extravagance of the statements and the plausibility of the comments and their tendency to be accepted, the court advised considering the statement made along with the speaker and common perceptions of the group.[24] As a statement becomes more extravagant and the sincerity and objectivity of the speaker is in question, the statement "will not be accepted by an ordinary person," leading to little if any cognizable injury.[25] Moreover, as comments become less plausible, the ordinary person will be less likely to connect the comment to an individual within the group.[26] Finally, the court acknowledged that extrinsic factors such as the medium in which the defamatory statement is presented can affect the credibility of the statement and influence the belief of the ordinary person, and so may play a role in assessing injury.[27] Thus, the analysis of injury is significantly fact intensive.[28]

In applying these factors, the court found that while the comments by Mr. Arthur were racist and tended to "have a pernicious effect on the opinions of members of its audience," the group is so large and heterogeneous that the characteristics of the members do not extrapolate to the group; therefore, the disparagements made by Mr. Arthur would be regarded as "sensationalistic generalizations."[29] An ordinary person would not change his opinion of an individual member of the group based on such statements.[30] The majority felt that, not only was the size of the group large, but it also lacked any structuralized or formalized associations and contained individualized members whose characteristics could not be generalized.[31] Furthermore, Mr. Arthur and his radio show were well-known for broadcasting "satirized" and sensational content so that "comments made by Mr. Arthur . . . have very little plausibility from the point of view of an ordinary person."[32] For these reasons, the Supreme Court of Canada affirmed the Appellate Court and found no injury to the class.[33]

C. Dissenting Opinion

The dissent agreed with the majority's list of factors used to determine whether there would be personal injury, but in applying them, the dissent concluded that, in this case, there was sufficient, identifiable harm to war-

23. Karim Renno, *Supreme Court of Canada Denies Taxi Drivers' Class Action Against Radio Host*, Osler (Mar. 4, 2011), http://www.osler.com/NewsResources/Details.aspx?id=3259.
24. *See Bou Malhab*, [2011] S.C.C. 9, ¶¶ 73-77.
25. *Id.* ¶ 74.
26. *Id.* ¶ 76.
27. *Id.* ¶¶ 78-79.
28. *See generally*, *id.* ¶¶ 57-72.
29. Lau, *supra* note 1; *Bou Malhab*, [2011] S.C.C. 9, ¶¶ 82, 94.
30. *Bou Malhab*, [2011] S.C.C. 9, ¶ 92.
31. *Id.* ¶ 86.
32. *Id.* ¶ 89.
33. *Id.* ¶¶ 81, 92, 94.

rant damages.[34] First, the dissent argued that the majority had given too much credit to the "ordinary person," conferring him with the attributes of an "ordinary third-year law student."[35] The dissent felt that an ordinary person with a lower standard of discrimination would find that Mr. Arthur's comments reflected on Arab and Haitian taxi drivers.[36] The dissent also contended that the "group was defined with sufficient precision and the statements [were] specific enough to be harmful to the reputations of each of its members."[37] Finally, the dissent maintained that Mr. Arthur's reputation as a provocateur would not result in a lack of credibility to the ordinary person.[38]

D. Conclusion

Bou Malhab v. Diffusion Métromédia CMR, Inc. furthers the analysis of injury in defamation suits, especially when class action suits are brought, and applies to both common and civil law jurisdictions.[39] In its analysis, the majority provides a set of factors in an attempt to objectively determine whether individuals in a group have been sufficiently and cognizably harmed to warrant damages. But in this case, plaintiffs must be careful when bringing a class action with a group that is large and heterogeneous since applying these factors may result in finding a lack of injury when analyzed under the ordinary person standard.

II. *ONTARIO (ATTORNEY GENERAL) V. FRASER*-LIMITS TO CONSTITUTIONALLY PROTECTED RIGHT OF COLLECTIVE BARGAINING

The Supreme Court of Canada recently considered collective bargaining for agricultural workers in *Ontario (Attorney General) v. Fraser*.[40] This lawsuit was originally brought before the Ontario Superior Court by three agricultural workers, the United Food and Commercial Workers Union ("UFCW"), and Michael Fraser, its director, on behalf of "workers in Ontario seeking the right to unionize and bargain collectively."[41] The Supreme Court of Canada found that Ontario's Agricultural Employee's Protection Act, 2002 ("AEPA") did not violate section 2(d) of the Canadian Charter of Rights and Freedoms ("the Charter").[42] In doing so, the court followed its 2007 decision in *Health Servs. & Support-Facilities Subsector Bargaining Ass'n. v. British Columbia* in which the court held that

34. Lau, *supra* note 1.
35. *Bou Malhab*, [2011] S.C.C. 9, ¶ 105.
36. *Id.* ¶ 108, 121.
37. *Id.* ¶ 119.
38. *See id.* ¶ 120.
39. *See* Renno, *supra* note 23.
40. *See* Ontario (Attorney General) v. Fraser, [2011] S.C.C. 20 (Can.).
41. Fraser v. Ontario (Attorney General), [2006] 79 O.R.3d 219, ¶ 1 (Can. Ont. S.C.J.).
42. *Fraser Decision Reveals Judicial Debate over Bargaining Rights*, SGM Law, (May, 4, 2011) http://www.sgmlaw.com/en/newsevents/SGMNewsDetail.cfm?ID=255.

the AEPA provided sufficient protection because it impliedly required the employees to act in good faith.[43]

A. Background

The UFCW, having a mandate from employees of Rol-Land Farms, a mushroom factory in Ontario, attempted to collectively bargain with management but were continuously rebuffed.[44] In response, the plaintiffs brought suit in the Ontario Superior Court seeking a declaration that the AEPA, enacted to protect the right of association for agricultural workers, was invalid because it violated section 2(d) of the Charter for failing to provide sufficient protection to collective bargaining.[45] The Ontario Superior Court relied heavily on *Dunmore v. Ontario (Attorney General)* in which the Supreme Court of Canada supported the view that while the Charter guarantees agricultural workers the freedom to unionize, it does not guarantee the right to "full collective bargaining."[46] The superior court concluded that the concern of the Supreme Court over the limited ability of agricultural workers to organize in *Dunmore*, stemming from their "low levels of skill and education, low status, and limited employment mobility," had been alleviated by the positive right to unionize guaranteed by the AEPA.[47] The court also concluded that because collective bargaining was not required and because the AEPA seemed to meet the minimum requirements listed in *Dunmore* such as "freedom to assemble, to participate in lawful activities of the association, and to make representations, and the right to be free of interference, coercion, and discrimination in the exercise of these freedoms," the AEPA was valid under the Charter as interpreted by *Dunmore*.[48]

At the Court of Appeals of Ontario, the majority held that because the right of collective bargaining was not protected, the AEPA breached section 2(d) of the Charter.[49] The court relied on *Health Services* along with *Dunmore* to conclude that section 2(d) required protecting the right to full collective bargaining.[50] Under the Baier Test, because the appellants were seeking section 2(d) protection for associational activities, and because the court concluded that their claims "were grounded in the fundamental freedom of association," the court found that "the AEPA substantially interferes with section 2(d) . . . [by failing] to provide sufficient protections to enable agricultural workers to engage in a meaningful process of collective bargaining," and that the government was "responsible for the inability to exercise the right to collectively bargain," such that

43. *Id.*; *see* Health Servs. & Support – Facilities Subsector Bargaining Ass'n v. British Columbia, [2007] 2 S.C.R. 391 ¶ 2 (Can).
44. Fraser v. Ontario (Attorney General), [2008] 92 O.R.3d 481 ¶¶ 1-2 (Can. Ont. C.A.).
45. *Id.* ¶ 29.
46. *Fraser*, [2006] 79 O.R.3d 219, ¶ 22.
47. *Id.* ¶¶ 21-23; *see id.* ¶ 18.
48. *Fraser*, [2008] 92 O.R.3d 481, ¶¶ 29-32.
49. *Id.* ¶ 36.
50. *Id.* ¶¶ 46, 52; *Fraser*, [2011] S.C.C. 20, ¶ 44.

the government violated the appellants' Charter section 2(d) rights.[51] Furthermore, because the violation was not justified under section 1 of the Charter,[52] the Court of Appeals for Ontario held that the AEPA was unconstitutional, invalidated it, and ordered the government to "provide agricultural workers with sufficient protections to enable them to exercise their rights to bargain collectively."[53]

B. Majority Opinion at the Supreme Court of Canada

The Supreme Court of Canada stressed that its previous holding in *Health Services* is "grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments, and consistent with this Court's purposive and generous interpretation of other *Charter* guarantees," and therefore should be upheld.[54] The court held that the Charter "s[ection] 2(*d*) protects . . . *the right to associate to achieve collective goals*," but does not guarantee any particular type of collective bargaining.[55] The Court emphasized that this did not require a full-blown collective bargaining procedure as in the Labour Relations Act, 1948 ("LRA") to protect the freedom of association of agricultural workers.[56] But the majority also held that section 2(d) also provided for a right to *good faith* bargaining in collective negotiations.[57] The AEPA meets this requirement because the employers have an implied duty to act in good faith when representations of employees are presented; this is clear from the purpose of the legislation and the intent of the legislators as presumed and expressed during debates.[58] Finally, the majority emphasized that although the Charter explicitly protects the *individual* right of association, exercising this right "may require the protection of a group activity."[59]

The Supreme Court of Canada concluded that unlike *Dunmore*, the AEPA did not make "meaningful association to achieve workplace goals effectively impossible."[60] The court argued that any "ambiguity in [the AEPA] should be resolved by interpreting [the statute] as imposing a

51. *Fraser*, [2008] 92 O.R.3d 481, ¶¶ 54-55, 59, 101; *see generally id.* § 5.
52. Charter section 1 allows for the abridgement of rights "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982, c. 11, s. 1 (U.K.).
53. *Fraser*, [2008] 92 O.R.3d 481, ¶ 138.
54. *Fraser*, [2011] S.C.C. 20, ¶ 97.
55. *Id.* ¶ 46.
56. Paul E. Broad, *Supreme Court of Canada Considers Scope of Collective Bargaining Rights*, FTR Now (Apr. 29, 2011) http://www.hicksmorley.com/modules.php?name=News&file=article&sid=937. The Labour Relations Act completely excluded agricultural workers from its protection for association and "substantially impeded their capacity to exercise their freedom to organize." *Fraser*, [2008] 92 O.R.3d 481, ¶ 38. *Dunmore* required that this violated section 2(d) of the Charter. *See Fraser*, [2008] 92 O.R.3d 481, ¶ 42.
57. *Fraser*, [2011] SCC 20, ¶ 51.
58. *Id.* ¶¶ 100-02.
59. *Id.* ¶ 64.
60. *Id.* ¶ 98.

duty on agricultural employers to consider employee representations in good faith."[61] Furthermore, because the plaintiffs did not turn to the Agricultural, Food, and Rural Affairs Tribunal ("AFRA Tribunal"), which has the power to enforce AEPA requirements, the majority agreed with the trial court that it was premature to consider whether the AEPA *in application* violated section 2(d) of the Charter.[62] For these reasons, the Supreme Court of Canada found the AEPA to be in compliance with the Charter. Also, because the AEPA had not been properly tested, although the position of agricultural workers remained vulnerable, as was the situation in *Dunmore*, the court found the appellants' claims of their violation to the right of equality under section 15 of the Charter to be premature.[63]

C. Concurring and Dissenting Opinions

While the majority upheld *Health Services*, J. Rothstein in a concurring opinion argued that the Charter section 2(d) does not protect collective bargaining and to that extent, the court should overrule *Health Services*.[64] J. Rothstein's concurrence regarded the protection of collective bargaining as unworkable and considered that *Health Services* was criticized by academics; however, most importantly, the concurrence argued that *Health Services* strayed from precedent by requiring positive action by the government to assist in "collective goals" rather than simply preserving freedom of association.[65] Thus, J. Rothstein asserted that there is not a duty of good faith or a right to collective bargaining imposed on the AEPA.[66] Similarly, J. Deschamp's concurrence found that the AEPA is constitutional but argued that there is only a limited constitutional right to collective bargaining, protecting the right of association and the process of associating but holding that the requirement for good faith bargaining is not required per *Dunmore*, the basis for enacting AEPA.[67]

The dissent, on the other hand, did not find that the AEPA provided sufficient protection for collective bargaining and, for that reason, argued that the statute was unconstitutional.[68] The dissent argued that *Health Services* imposes a duty on employers and employees to negotiate in good faith and requires a right to collective bargaining.[69] Because the AEPA legislative history explicitly eschewed collective bargaining and because there is no "statutory enforcement mechanism," as the AFRA Tribunal was not granted authority to enforce good faith bargaining, the dissent

61. *Id.* ¶¶ 102.
62. *Id.* ¶¶ 109-12.
63. *Id.* ¶¶ 114-16.
64. *See id.* ¶ 128.
65. *Id.* ¶¶ 152, 166, 173-75, 190.
66. *Id.* ¶ 276.
67. *Id.* ¶¶ 308-10.
68. *Id.* ¶ 322.
69. *Id.* ¶ 326.

argued that the AEPA violated the current understanding of section 2(d).[70]

D. Conclusion

The majority held that the AEPA did not violate section 2(d) of the Charter "because it provided a meaningful exercise of the right of association and a tribunal for dispute resolution."[71] The concurring opinions indicate that the interpretation of *Health Services*, at least in terms of the requirement of collective bargaining, is in question.[72] Although the majority supported *Health Services*, they limited the extent of bargaining rights to those constitutionally required.[73]

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70. *Id.* ¶¶ 332, 340-41.
71. Posting of Omar Ha-Redeye to SLAW, *SCC Decision in Fraser v. Ontario*, http://www.slaw.ca/2011/04/29/scc-decision-in-fraser-v-ontario/ (Apr. 29, 2011).
72. *Id.*
73. Broad, *supra* note 56.