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CCPA REVIEW

Labour Notes

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Charter Protection Extended to Collective Bargaining – How Far Does it Reach?

Over twenty years ago, in April 1987, the Supreme Court of Canada released the labour trilogy, and in doing so dashed the hopes of the labour movement that the Charter would help their cause. At that time, the Court gave freedom of association a narrow interpretation which essentially failed to give effect to the fundamentally collective nature of the right. In doing so, it ruled that freedom of association only meant every individual was free to form, join or maintain an association, and to do with others that which the person is lawfully entitled to do alone,¹ Despite the recognition at international law of collective bargaining and the right to strike as essential elements of collective bargaining, the court's rationale was that Canada's system of collective bargaining was "too complicated and sophisticated"² to be put under scrutiny by the courts.

The outcome was that the right to strike was not granted constitutional protection, although the door was left open in the PSAC decision³ (one of the three labour trilogy cases) to argue that constitutional pro-

tection could be extended to collective bargaining in certain circumstances. (In the trilogy, four of six justices held that the right to strike was not protected, while only three held that collective bargaining was not protected.) However, in 1990 the Court firmly shut the door on constitutional protection for collective bargaining in the PIPS decision.⁴

For close to twenty years, the rights of organized labour were essentially trampled with impunity by various governments. Collective agreements were overturned by legislation.⁵ Certain groups continued to be denied access to collective bargaining.⁶ Governments' restricted collective bargaining by preventing certain matters from being submitted to arbitration where the right to strike was removed.⁷

However, on June 8, 2007, in a stunning reversal of its previous decisions, the Supreme Court of Canada held that "the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand."⁸

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With this statement, the Court breathed new life into s. 2 (d). At a minimum, the right to bargain collectively gained constitutional protection, and governments can no longer override collectively bargained rights with impunity. The factual underpinning of this case is important to consider. In 2002, British Columbia's new government led by Gordon Campbell enacted The Health and Social Services Delivery Improvement Act, S.B.C. 2002 to reduce costs and facilitate the management of healthcare workers by their employers. The legislation invalidated key job security protections in collective agreements then in force and it prevented bargaining about those same job security matters. Employers and employees could not contract out of the legislation. Job assignments and transfers, contracting out, the status of employees under contracting out arrangements, job security programs and layoffs and bumping rights were all affected by the legislation. There were minimal discussions with the affected unions prior to the enactment of the legislation.

The Court concluded that the legislated provisions which overrode protections against contracting out, and layoff and bumping rights, violated the freedom of association guarantee. However, the provisions which modified the successor rights provisions in the legislation were upheld, on the basis that they were statutory and not negotiated protections, even though the Court acknowledged that the legislation made it less likely that a healthcare employer would still be considered the employer after contracting out had occurred.⁹ The legislative abolishment of labour force adjustment programs to provide training and financial assistance to health care workers was upheld as being constitutional as the programs were not an outcome of collective bargaining. The Court also upheld provisions that made modest modifications to transfer and reassignment rights, on the basis that these changes left the substance of negotiated protections in place.

The Court concluded that the constitutional right to collective bargaining "concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment"¹⁰. Therefore, it guarantees the process through which these goals are pursued. It means that:

- employees have the right to act in common to reach shared goals related to workplace issues and terms of employment, to present demands to employers collectively and to engage in dis-

cussions in an attempt to achieve workplace-related goals;

- government employers have a corresponding duty to agree to meet and discuss employee demands; and
- constraints are placed on government' ability to exercise of legislative powers in respect of the right to collective bargaining.

In coming to these conclusions the Court held that a government measure would be found unconstitutional if there was "substantial interference" in collective bargaining. A two stage test was adopted. Under the first prong, there must be an inquiry into the importance of the matter to collective bargaining, i.e. the ability of union members to pursue collective goals together. The second part of the test requires an inquiry into the manner in which the measure preserves or impacts the collective right to good faith negotiation and consultation.¹¹

Therefore, not all legislation or conduct which interferes with collective bargaining will be found to be unconstitutional. In fact, the Court expressly held that the right to bargain collectively does not guarantee a particular substantive or economic outcome. Further, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method.¹²

What does all this mean? How limited or how expansive is the right? In determining whether the government is substantially interfering with the process of collective bargaining, a court will consider two factors. First, it will look at how important the subject matter is to the process of collective bargaining. The more important the matter, the more likely that there is a substantial interference with the section 2(d) right.

The second factor a court will consider in determining whether the government has substantially interfered with collective bargaining is the extent to which the government measure undermines or impacts on the collective right to good faith negotiation and consultation. The Court held that the duty to negotiate in good faith lies at the heart of collective bargaining. While this duty is "essentially procedural" and "does not dictate the content of any particular agreement achieved through collective bargaining," the parties must engage in "meaningful dialogue" and "make a reasonable effort to arrive at an acceptable contract." While different situations may de-

mand different processes and timelines, there nevertheless remains a requirement that legislative provisions maintain the process of good faith consultation fundamental to collective bargaining.

A court must look to both factors. If the matters affected do not substantially impact on the process of collective bargaining, the measure will not violate section 2(d) and the employer may be under no duty to respect the process of good faith bargaining. At the same time, even if the matters do substantially touch on collective bargaining, as noted earlier section 2(d) will not be violated if the process of consultation and good faith negotiation is not undermined and is preserved. The Court concluded:

In summary, s. 2(d) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation will s. 2(d) be breached.

Will the decision provide labour with any new arsenal against draconian governmental action? The answer is yes, but to what extent is currently unclear. However, there is some certainty where the parties have agreed to certain provisions in their collective agreements which governments then subsequently decide to override, or when governments prevent bargaining over important items. But, governments can always try to justify interferences with freedom of association by relying on section 1 of the Charter, which provides that legislation interfering with constitutional rights can be upheld where it is "demonstrably justified" as a reasonable limit in a free and democratic society. It must be recalled that in *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] S.C.J. No. 16, the Supreme Court of Canada allowed the government of Newfoundland and Labrador to rely on financial exigency arguments to defeat the equality rights of women to pay equity after years of litigation.

As well, some employer advocates have argued that the decision means that a substantial impact on a collective right may ultimately be tolerated as long as the process is preserved, in other words that freedom of association is not violated as long as, before overriding a collective agreement provision, government consults with the affected union. However, it would be folly for any government to mistakenly believe that as long as it goes through the motions of talking to organized labour, it can then over-ride collective agreements or otherwise interfere with collective bargaining with impunity. The more likely meaning of the court's decision is that overriding collective agreements or preventing future negotiations over important issues fails to respect the process of good faith bargaining, and so interferes with freedom of association.

There may be lessons to be learned from the Court's approach to the constitutional protection of treaty and aboriginal rights under section 35. There the duty to consult has given rise to significant changes in the way governments (and developers) must conduct themselves where fundamental rights are involved. While some would argue that progress has been far too slow, governments must now routinely establish bona fide consultation processes with aboriginal peoples. Those processes require government to listen with an open mind and to take into account the issues being raised during the discussions.

Perhaps even more importantly, the duty to consult has also been found to include the duty to accommodate the rights of aboriginal peoples. Therefore, we can expect that the bar will also be raised when it comes to examining governmental action in relation to collective bargaining rights.

Not surprisingly, the Court's decision has already reopened issues related to the right to strike.¹³ It can be expected that back to work legislation, as well as other draconian 1990's era legislation enacted primarily by Conservative governments will be subject to challenge. It remains to be seen whether such challenges will meet with success, given that the Court explicitly stated it was not considering whether the right to strike is protected as part of freedom of association. However, given that the right to strike is regarded as essential to freedom of association and collective bargaining at international law, it would seem difficult to justify excluding the right to strike from the ambit of s. 2(d).

As was the case twenty years ago, the Court's analysis of s. 2(d) poses difficulties for all parties. As a result of

its recent decision, the Supreme Court of Canada has now signaled to governments that they must consider the rights of workers to engage in collective bargaining before they proceed with legislation that will affect workers' existing and future rights. However, we can expect that with the principle of constitutional protection for collective bargaining now being established, the precise implications of its scope and application will be contested.

Whether or not labour has gained meaningful and substantive rights from this decision will depend on the extent to which future courts take an unduly narrow reading of the decision as simply imposing a mere consultation requirement on governments before overriding collective bargaining rights, or more fulsomely and purposively view the decision as requiring governments to truly respect good faith bargaining by respecting negotiated collective agreements and avoiding legislation which limits the scope of bargaining. This more robust and expansive view of freedom of association would be consistent with international law, the purpose of the Charter and the SCC's jurisprudence on collective aboriginal rights. However, it is likely that defining the scope of those activities with some certainty will give rise to further protracted litigation which means the landscape will be murky for some time to come.

The recent decision of the Court has finally given labour a significant toehold to argue for a more expansive view of freedom of association, but one of the major challenges facing the labour movement will be ensuring that the court's decision is used as a springboard for on the ground organizing and mobilization, and not as a panacea to arrest the deteriorating rate of unionization in our economy. Only time will tell whether the euphoria from this recent decision of the Supreme Court will be short lived or meaningful. In the meantime, the labour movement should not lose sight of the ongoing need for organizing and mobilizing concerted political action and the development of political alliances, which have proven over time to be more effective than reliance on the courts to

advance labour rights and freedoms.

- Valerie Matthews Lemieux and Steven Barrett

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NOTES

1. Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at p.62
2. Ibid, at p. 65
3. Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424
4. Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367
5. An Act to Amend the Labour Relations Act, 1997 S.M. (Bill 26); Social Contract Act, 1993 S.O. (Bill 48)
6. For example, Agricultural workers and managers
7. Public Schools Amendment Act, 1996 S.M. (Bill 72)
8. Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] S.C.J. No. 27, para. 20
9. Ibid, para. 122, p.53
10. Ibid, para. 128, p.54
11. Ibid, para. 93, p.45
12. Ibid, para. 91, p.45
13. See e.g. Collective Bargaining in Canada – Human right or Canadian Illusion: Summary of Legislation Restricting Collective Bargaining and Trade Union Rights in Canada 1982-2004

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