
Supreme Court of Canada extends *Charter* protection to collective bargaining

By a 6-1 majority, the Supreme Court of Canada has overruled 20 years of its own jurisprudence and held that the procedural right of collective bargaining is protected by the *Canadian Charter of Rights and Freedoms*. In a trilogy of decisions rendered in the 1980's (the Trilogy), the Court had held that the right of free association guaranteed by section 2(d) of the *Charter* was limited, in the labour relations context, to the right of individuals to join trade unions. With the decision issued in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (June 8, 2007) the Court has moved decisively away from that position and extended the constitutional protection to a significant range of collectively-exercised rights.

BILL 29

The case arose out of Bill 29, the *Health and Social Services Delivery Improvement Act*, legislation introduced by the B.C. government in 2002 to reorganize the health care sector in that province. Introduced with only minimal consultation with affected unions, Part 2 of the Act gave health care employers greater flexibility to organize their relations with their employees as they see fit, in ways that would not always have been permissible under existing collective agreements and without adhering to notice and consultation requirements in these agreements. It introduced changes to transfers and multi-worksites assignment rights (sections 4 and 5), contracting out (section 6), the status of employees under contracting-out arrangements (section 6) and layoffs and bumping rights (section 9).

The Act invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. Both employees and employers were prohibited from contracting out of Part 2 or relying on a collective agreement inconsistent with Part 2.

The unions' attempt to challenge the Act was unsuccessful, with both the B.C. Supreme Court and the B.C. Court of Appeal dismissing the claim, citing the Trilogy jurisprudence. The plaintiffs then appealed to the Supreme Court of Canada.

The majority of the Court held in favour of the unions, in the process explicitly overruling the approach it had taken in the 1980's cases and concluding that "s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues."

COLLECTIVE BARGAINING RIGHTS PROTECTED BY *CHARTER*

The Court pointed to four bases for reversing its approach to the protections afforded to collective bargaining rights under s. 2(d):

1. The Court held that the reasons evoked in the Trilogy cases for holding that the guarantee of freedom of association does not extend to collective bargaining could no longer stand. The Trilogy cases had erred in holding that the rights to strike

and to bargain collectively were “modern rights” created by legislation, and not “fundamental freedoms”, and were too deferential to the legislature in matters concerning labour relations. They also erred in ruling that freedom of association applied only to rights exercised by individuals and not to groups and in overlooking the importance of collective bargaining as an element of freedom of association.

2. Collective bargaining rights do fall within the ambit section 2(d) of the *Charter*. The Court concluded that collective bargaining, despite early discouragement from the common law, had long been recognized in Canada and was the most significant collective activity through which freedom of association is expressed in the labour context. These supported the view that the concept of freedom of association under s. 2(d) of the *Charter* includes the procedural right to collective bargaining.
3. Collective bargaining is an integral component of freedom of association in international law, which influences the interpretation of *Charter* rights. The Court held that international conventions binding Canada recognize the right of the union members to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection.
4. Interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values. The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over their work, which is a major aspect of their lives.

A RIGHT TO A PROCESS, NOT TO AN OUTCOME

The Court stated that the activity protected by section 2(d) could be described as employees banding together to achieve particular work-related objectives, but not the objectives themselves. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals, without “substantial interference” in this activity. Where the employer is the government, the right requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

Given that the right to collectively bargain is a right to a process, not to an outcome, for a *Charter* action to succeed, the interference with the right must be so substantial that it interferes not only with the attainment of the union members’ objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

ASSESSING SUBSTANTIAL INTERFERENCE

The Court stated that determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves asking two questions: 1) how important is the affected matter to the process of collective bargaining, and to the capacity of the union members to pursue collective goals in concert and 2) in what manner does the state’s action impact on the collective right to good faith negotiation and consultation.

The duty to negotiate in good faith, the Court stated, is central to the determination of whether a state action constitutes substantial interference. In considering whether the state action infringes the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding these actions. However, the Court stated, the bottom line is that such actions must preserve the process of good faith consultation fundamental to collective bargaining.

APPLICATION OF THE PRINCIPLES TO THIS CASE

Based on the approach outlined above, the Court held that three of the Act's provisions violated section 2(d) of the *Charter*, but several others did not. Two of the non-offending provisions, sections 4 and 5, altered the provisions of the prior collective agreements for transfer and reassignment. While they deleted some important provisions in the agreements, the Court held, under other regulations, protections similar in part to the deleted provisions were preserved. Accordingly, the Court held that the impact on the prior collective agreements was not sufficiently substantial to meet the first leg of the test.

The three offending provisions, sections 6(2), 6(4) and 9 dealt with contracting out, layoffs and bumping. These were considered by the Court to have central importance to unions, thus passing the first test. The Court then considered whether they preserved the process of collective bargaining and found they did not. The Court stated that the provisions constituted a "virtual denial" of the right to a process of good faith bargaining and consultation and nullified requirements to consult with the union before contracting out or laying off.

Accordingly, the Court held that these three provisions constituted a significant interference in the right to bargain collectively and therefore violated section 2(d) of the *Charter*. The Court suspended the effect of its ruling for 12 months to allow the provincial government to determine how to address the impact of the decision striking down the offending provisions.

In our view

Obviously, this decision will have a significant impact, but the extent of that impact remains to be seen. It should also be noted that the right to strike was not considered in this decision.

Private sector employers should note that this ruling does not affect their actions vis-à-vis their unions. However, while only governmental employers are affected in terms of their actions, private sector employers may be affected if legislation limiting the right to bargain collectively is ruled unconstitutional.

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