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BY: PAULE. BROAD AND MICHAEL A. HINES

SUPREME COURT EXPANDS “FREEDOM OF ASSOCIATION” AND RECOGNIZES RIGHT TO STRIKE

In three decisions released in late January, 2015, the Supreme Court of Canada has once again revisited, and expanded, the reach of section 2(d) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), which guarantees “freedom of association”. In two cases involving the RCMP, the Court held that the unique bargaining scheme imposed on the RCMP by the federal government violated section 2(d), but held that federal wage restraint legislation reducing wage increases approved under that bargaining scheme did not violate section 2(d). In the third decision, the Court went so far as to hold that the rights encompassed by section 2(d) include the right to strike. In the first and third cases, the Court also held that the identified violations were not justified under section 1 of the *Charter*.

In this *FTR Now*, we will review these decisions and the impact they may have on labour relations in Canada.

THE MOUNTED POLICE DECISION

The first decision to consider is *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, released on January 24, 2015 (“*Mounted Police*”). At issue in that decision was the constitutionality of the collective bargaining regime available to members of the RCMP.

Under this regime, RCMP members were excluded from collective bargaining under the federal *Public Service Labour Relations Act*. Rather, regulations under the *Royal Canadian Mounted Police Act* established a program called the Staff Relations Representative (“SRR”) Program, a consultative process through which the members of the RCMP could have some input into their pay and other remuneration.

The consultative process involved the development of a recommendation respecting wages by a Pay Council – an advisory board made up of a neutral chair appointed by the Commissioner of the RCMP, two members of management and two SRRs to represent the members' interests.

The Pay Council used a process of consensus and collaboration to reach a recommendation that would be presented to the Commissioner. The Commissioner would then discuss the recommendation with the Treasury Board Secretariat, which had complete discretion to accept or reject the recommendation. Once a recommendation was accepted, it would be sent to the responsible Minister for submission to Treasury Board, which would have the final power to determine the compensation.

Significantly from the *Charter* perspective, while members of the RCMP were not prohibited from forming “associations” (such as the one that had commenced the court action), such associations had no ability to influence terms and conditions of employment in any meaningful way.

The majority of the Court (in a 6-1 decision) found that this collective bargaining regime was unconstitutional. The majority considered its recent decisions that had affirmed a constitutional right to collective bargaining – *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (“*B.C. Health Services*”) and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (“*Fraser*”) – and confirmed that a liberal approach to interpreting section 2(d) is now the Court’s accepted approach.

In its reasons, the majority adopted principles from the dissenting judgment of Chief Justice Dickson in the 1987 Supreme Court decision in *Reference re Public Service Employee Relations Act (Alta.)* (in which the majority of the Court at that time had rejected collective bargaining altogether as a component of “freedom of association”) and concluded that “freedom of association” encompasses:

- the right to join with others [i.e. engage in “collective activity”] to form associations;
- the right to join with others in support of other constitutional rights; and
- the right to join with others to meet on more equal terms the power and strength of other groups or entities.

This last aspect of “freedom of association” was described as a means for enabling those who are vulnerable to act collectively to better achieve a

balance of power in their interactions and relations with other, more powerful entities.

The majority confirmed that the test for determining whether a particular bargaining regime violates section 2(d) is whether the regime results in “substantial interference with the right to a meaningful process of collective bargaining.” In confirming this test, the majority departed from the more restrictive language that it had endorsed in *Fraser*, whereby a section 2(d) violation would only be found if the absence or weakness of a particular bargaining regime made it “effectively impossible” for the right-holders to associate for any purposes.

The Court held that there are two essential features of a meaningful process for collective bargaining – (1) employee choice and (2) independence from employers of a degree “sufficient to enable [employees] to determine their collective interests and meaningfully pursue them.” The RCMP bargaining regime failed to satisfy either of these essential conditions and so the majority concluded that there was a violation of section 2(d) of the *Charter*. The majority also found that the federal government could not justify the violation under section 1 of the *Charter*.

The Court gave the government 12 months to remedy the *Charter* breach, failing which it appears that the RCMP members would be permitted to organize under the *Public Service Labour Relations Act*.¹

THE MEREDITH DECISION

On the same date that it released its decision in *Mounted Police*, the Court also released its decision in *Meredith v. Canada (Attorney General)*, 2015 SCC 2. Whereas the *Mounted Police* decision addressed fairly fundamental issues of representation, *Meredith* addressed the extent to which the outcomes of a collective bargaining process may receive *Charter* protection under section 2(d).

Meredith concerned the results of the bargaining process established under the SRR Program described above. In mid-2008, after the process had run its course, Treasury Board adopted and implemented relatively generous

¹ In addition to its findings on the SRR Program, the majority found that the exclusion of the RCMP from the *Public Service Labour Relations Act* violates the *Charter*. In doing so, the Court overturned its own prior decision from 1999 that had upheld the exclusion – *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989.

recommendations for three years of wage increases, acting pay increases and various other pay adjustments.

After the financial crisis hit later that year, the federal government passed the *Expenditure Restraint Act* (“*ERA*”) which limited pay increases for the entire federal public sector. This resulted in a reduction of the previously approved RCMP increases and the elimination of the acting pay increases and other adjustments. These outcomes were challenged by members of the National Executive Committee of the SRR Program (ironically, the very body that was criticized in *Mounted Police* as being insufficiently responsive to the interests of RCMP members).

In a decision that seems difficult to square entirely with the 2007 *B.C. Health Services* decision (in which the Court struck down efforts of the British Columbia government to claw back negotiated wage enhancements of health sector employees), the majority of the Court found that the *ERA* did not violate section 2(d) of the *Charter*. The majority was influenced by the more limited impact on salaries (which were permitted to increase at the same rate as had been achieved by federal trade unions in bargaining), by the fact that the *ERA* did not target a specific subsector of federal employees and by the fact that some aspects of the SRR Program consultative process were permitted to proceed, albeit with respect to a limited range of compensation matters. Taken together, the impact of the *ERA* did not amount to a substantial interference with the collective bargaining process.

THE SASKATCHEWAN FEDERATION OF LABOUR DECISION

The third decision is *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, released by the Court on January 31, 2015. In this decision, the Court found that “freedom of association” under the *Charter* includes a right to strike and that the prohibition against strikes in the particular Saskatchewan “essential services” legislation in question was not saved under section 1 of the *Charter*.

By way of background, in 2007 the newly-elected Saskatchewan government enacted two pieces of labour legislation – *The Public Service Essential Services Act* (the “*PSES Act*”) and *The Trade Union Amendment Act 2008* (the “*TUA Act*”).

The *PSES Act* was drafted in response to a series of public sector labour disputes during which the government had difficulty ensuring that essential services were continued. The *PSES Act* provided a mechanism by which the government and other public sector employers could, in consultation with

public sector unions, discuss which services were essential in the event of a strike or lockout. Where the parties could not negotiate an essential services agreement, employers were given the ability to make the following determinations unilaterally:

- the classifications of employees who had to work during the work stoppage;
- the number of employees in each classification who had to work;
- the names of the specific employees who had to work; and
- for most public employers, which essential services had to be maintained.

There was only limited oversight of the employer's decision given to the Labour Relations Board.

The *TUA Act* made a number of changes to the *Trade Unions Act*, including the following:

- changes to the certification process, such as (i) increasing the minimum card support required for a certification application from 25% to 45%, (ii) requiring membership cards to have been signed within the previous three months, as opposed to six months previously, and (iii) requiring a certification vote in all cases, but without specifying a time frame in which a vote must be held;
- changes to the decertification process, including lowering the threshold of employee support to trigger a vote from 50% to 45% and requiring that cards be signed within the previous three months; and
- changes to increase the scope of permitted employer communications.

The new statutes were challenged by a number of public sector unions and the Saskatchewan Federation of Labour as violating various rights and freedoms under the *Charter*.

In a decision released on February 6, 2012, the Saskatchewan Court of Queen's Bench found that the *PSES Act* violated section 2(d) of the *Charter*, and was not saved by section 1. In so finding, the Trial Judge held that the freedom of association guarantee in the *Charter* includes a constitutionally protected right to strike. The Trial Judge also found that the *TUA Act* did not violate the *Charter*. While recognizing that its changes would have the effect of reducing the success rate of union organizing drives, he found that they did not infringe the freedom of employees to choose a union to collectively bargain on their behalf.

The Saskatchewan Court of Appeal, relying upon the Supreme Court's 1987 decision in *Reference re Public Service Employee Relations Act (Alta.)*, upheld the Trial Judge's decision on the *TUA Act* but overturned his finding on the *PSES Act*. In so doing, the Court of Appeal held that only the Supreme Court could overturn its prior decisions concerning the *Charter* as it relates to the right to strike.

In its judgment released last week, the Supreme Court of Canada has done just that.

The majority of the Court, in a 5-2 decision, found that the right to strike is an "indispensable component" of the *Charter*-protected right to bargain collectively, which is, itself, an element of "freedom of association" as first recognized by the Court in the 2007 *B.C. Health Services* decision. The majority described the test as one of "substantial interference":

The test, then is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.

Where there is no right to strike (and, therefore, a substantial interference with collective bargaining and a section 2(d) violation), it will be incumbent on the government, if the legislation is to be saved under section 1, to provide an alternative way to resolve disputes:

Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the Charter.

It is important to note that, in a given case, the presence of an arguably meaningful alternative dispute resolution process is not used to prevent a section 2(d) violation from being found to exist. The violation is established by the simple failure to provide for a right to strike. This makes it relatively simple for applicants to establish a violation of the *Charter*, and places the onus on the government to demonstrate, according to the complex and exacting tests under section 1, that the violation is justifiable.

There was little question for the majority that the *PSES Act* substantially interfered with collective bargaining. Moreover, the failure to provide meaningful dispute resolution mechanisms meant that the *PSES Act* could

not be justified under section 1. In this regard, the Court noted that in all other Canadian jurisdictions, essential services legislation includes some form of third-party adjudication of disputes. Given the absence of such a process, the system established under the Saskatchewan statute did not limit the section 2(d) infringement as minimally as possible, a critical consideration in determining whether legislation that is not *Charter*-compliant can be “saved” under section 1 of the *Charter*.

With regard to the *TUA Act*, the Court said little beyond simply agreeing with the Trial Judge that it did not violate section 2(d). While the *TUA Act* might make union organizing more difficult, it did not amount to a substantial interference with collective bargaining.

TAKEAWAYS FOR EMPLOYERS

The potential impact of these decisions on labour relations in Canada is immense, as they represent a significant reorientation of longstanding principles of law.

This impact will be felt most keenly by governments, which will now need to consider both the right to collectively bargain and the right to strike when fashioning labour policy and new labour law statutes, and particularly when deciding whether to intervene in labour disputes, as governments do from time-to-time. Moreover, to the extent that governments are attempting to control and reduce public sector compensation costs, the decisions signal that the government will need to take care in how it seeks to implement such changes in the unionized public sector.

How, precisely, the decisions will impact employers is less certain. As we noted some years ago when *B.C. Health Services* and *Fraser* were decided, unionized employers already have a statutory duty to bargain in good faith, and, at least in the private sector, trade unions have a right to legally strike. Nevertheless, some broad potential implications can be anticipated.

With the *Mounted Police* decision, the Court appears to have again raised the bar regarding the steps that may be required of governments to satisfy their section 2(d) obligations in creating statutory platforms upon which associative rights can be exercised in the labour relations context. Under the test established in *Fraser*, it appeared sufficient for governments to do only that which was necessary to ensure that associative rights (in general terms) could be exercised. This test now appears to have been discarded. Instead, governments must ensure that their statutory labour law regimes establish conditions that permit “meaningful collective bargaining” to take place. This

includes avoiding any interference with the rights of employees to join with one another “to meet on more equal terms the power and strength of other groups or entities.”

The enhancement by the Supreme Court of rights to participate in collective bargaining could mean, for example, that many traditional exclusions from collective bargaining may be subjected to *Charter* scrutiny. There is good reason to believe that any wholesale exclusion from collective bargaining could be considered a violation of section 2(d) of the *Charter*, and would therefore need to be justified under section 1 in each case.

The *Mounted Police* case may also call into question the constitutionality of provisions that determine, without employee input, the identity of a bargaining agent (as is the case, for example, in Ontario’s school board sector, where teacher bargaining agents are statutorily determined rather than selected by employee vote). Similarly, provisions that allow “association” for labour relations purposes but forbid membership in a “trade union” chosen by the employees (as is the case under Ontario’s *Police Services Act*) may come under judicial scrutiny.

In raising this possibility, we recognize that the majority stated that Ontario’s *School Boards Collective Bargaining Act, 2014* “offers another example that may be acceptable.” However, the Court did not decide this point, and, at the very least, the *Mounted Police* decision opens up such alternative models to challenge based on whether they offer sufficient choice and independence to the affected employees.

The recognition in *Saskatchewan Federation of Labour* of a right to strike as “an indispensable component” of the constitutional right to bargain collectively raises its own questions, including how that right will affect other labour relations practices. For example, it would seem that any form of back-to-work legislation would be susceptible to constitutional challenge and would need to be justified to be upheld. More broadly, the many labour systems that mandate interest arbitration and the exclusion of strikes are now presumptively contrary to section 2(d) and may all have to be justified on a case-by-case basis.

What of other practices that could be seen as interfering with the effectiveness of strike action? For example, will laws permitting replacement workers be challenged as unconstitutional?

On the other hand, and notwithstanding the broadened understanding of “freedom of association”, the *Meredith* decision suggests that some limits still

exist. The Court has reinforced the concept (established in *B.C. Health Services*) that the results of bargaining receive less constitutional protection than the process itself provided that the process is respected to at least some degree.

As is often the case, these three decisions are likely to raise as many questions as they have resolved. The next few years promise to be an interesting time as the full implications of these decisions work their way through Canada's labour relations systems.

If you would like to discuss what these decisions may mean for your organisation, please contact your regular Hicks Morley lawyer.

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Hicks Morley Hamilton Stewart Storie LLP
www.hicksmorley.com

TORONTO
77 King St. W.
39th Floor, Box 371
TD Centre
Toronto, ON M5K 1K8
Tel: 416.362.1011
Fax: 416.362.9680

WATERLOO
100 Regina St. S.
Suite 200
Waterloo, ON N2J 4P9
Tel: 519.746.0411
Fax: 519.746.4037

LONDON
148 Fullarton St.
Suite 1608
London, ON N6A 5P3
Tel: 519.433.7515
Fax: 519.433.8827

KINGSTON
366 King St. E.
Suite 310
Kingston, ON K7K 6Y3
Tel: 613.549.6353
Fax: 613.549.4068

OTTAWA
150 rue Metcalfe St.
Suite 2000
Ottawa, ON K2P 1P1
Tel/Tél: 613.234.0386
Fax/Télééc: 613.234.0418