Summary of Supreme Court decision on BC's Bill 29

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Charter of Rights: Right to Bargain Collectively

Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia (B.C.C.A., July 5, 2004)(30554)

"*The Health and Social Services Delivery Improvement Act* was adopted as a response to challenges facing British Columbia's health care system. The Act was quickly passed and there was no meaningful consultation with unions before it became law. Part 2 of the Act introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of contracted out employees (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9). It gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, s. 10 voided any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. The appellants, who are unions and members of the unions representing the nurses, facilities, or community subsectors, challenged the constitutional validity of Part 2 of the Act as violative of the guarantees of freedom of association and equality protected by the *Canadian Charter of Rights and Freedoms*. Both the trial judge and the Court of Appeal found that Part 2 of the Act did not violate ss. 2(d) or 15 of the *Charter*." The Supreme Court of Canada held (6:1) the appeal is allowed in part. Sections 6(2), 6(4), and 9 of the Act are unconstitutional. This declaration is suspended for a period of 12 months. (Deschamps J. dissenting in part) In joint reasons, Chief Justice McLachlin and Justice LeBel wrote the following (at pp. 6, 18, 21-23, 25, 31, 33, 43-45, 52, 67, 69):

“Neither the trial court nor the British Columbia Court of Appeal was willing to recognize a right to collective bargaining under s. 2(d) of the *Charter*, although the Court of Appeal acknowledged that the Supreme Court of Canada had opened the door to the recognition of such a right. In the result, the Act was held to be constitutional under ss. 2(d) and 15.

The plaintiffs argued at trial that the impugned legislation violated several constitutional rights guaranteed under the *Charter*: freedom of association (under s. 2(d)), life, liberty and security of the person (under s. 7), and equality (under s. 15). The s. 7 argument was not pursued on subsequent appeals.

…The general purpose of the *Charter* guarantees and the language of s. 2(d) are consistent with at least a measure of protection for collective bargaining. The language of s. 2(d) is cast in broad terms and devoid of limitations. However, this is not conclusive. To answer the question before us, we must consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of association in the larger international context, and whether *Charter* values favour an interpretation of s. 2(d) that protects a process of collective bargaining: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344, per Dickson J. Evaluating the scope of s. 2(d) of the *Charter* through these tools leads to the conclusion that s. 2(d) does indeed protect workers’ rights to a process of collective bargaining.

…Workers’ associations have a long history. In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began.

In Canada, workers’ organizations can be traced back to the end of the 18th century…However, it was not until the industrial revolution that workers’ organizations took on more than a marginal role, and that a real labour movement was born.

From the beginning, the law was used as a tool to limit workers' rights to unionize…After the French Revolution, the British Parliament, convinced that labour organizations were the nesting ground of potential revolutions, adopted the Combination Acts of 1799 and 1800, making it unlawful for two or more workers to combine in an attempt to increase their wages, lessen their hours of work or persuade anyone to leave or refuse work…Combinations of workers were already illegal at common law.

…The question of whether the repressive common law doctrines and the Combination Acts of 1799 and 1800 were introduced into Canada is subject to controversy.

…By the beginning of the 1900s, the main criminal barriers to unionism in Canada had been brought down.

…At the time the *Charter* was enacted in 1982, collective bargaining had a long tradition in Canada and was recognized as part of freedom of association in the labour context.

…The protection enshrined in s. 2(d) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining.

…Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against 'substantial interference' with associational activity, in accordance with a test crafted in Dunmore by Bastarache J., which asked whether 'excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association'… Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the *Charter*. It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a

process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It 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.

The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome.

…To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as 'union breaking' clearly meet this requirement. But less dramatic interference with the collective process may also suffice.

…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.

…To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in N.A.P.E. and Martin, indicating that 'courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints'.

…We conclude that the requirement of minimal impairment is not made out in this case. The government provides no evidence to support a conclusion that the impairment was minimal. It contents itself with an assertion of its legislative goal - ‘to enhance management flexibility and accountability in order to make the health care system sustainable over the long term’, - adding that ‘the Act is a measured, reasonable, and effective response to this challenge, and ... satisfies the minimal impairment requirement’… In the absence of supportive evidence, we are unable to conclude that the requirement of minimal impairment is made out in this case.”
In dissenting reasons, Justice Deschamps wrote the fllowing (at para. 170):
“I am in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(d) of the Canadian *Charter* of Rights and Freedoms in the collective bargaining context. I also agree that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, I part company with my colleagues over their analysis relating to both the infringement of s. 2(d) and the justification of the infringement under s. 1 of the *Charter*.?”