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CASE LAW UPDATE: AN HISTORIC WIN FOR WORKERS' RIGHTS

The Supreme Court Of Canada Releases New Labour Trilogy

In an exciting start to 2015, the Supreme Court of Canada has released three decisions defining the scope of constitutional protection for workers' rights under s. 2(d) of the *Charter*. This new labour trilogy advances protection for the fundamental rights of workers, and continues the trend in the jurisprudence toward workplace justice.

The jurisprudence as a whole now unequivocally establishes that freedom of association under section 2(d) of the *Charter* in the labour context protects the right of employees:

- to establish, belong to and maintain a trade union;
- to join a trade union of their choosing that is independent from management;
- to engage in a meaningful process of collective bargaining, including the right to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, and to have a means of recourse should the employer not bargain in good faith; and
- to strike.

The three decisions in the new labour trilogy – *Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada*, and *Meredith v. Canada* – are summarized below.

***Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4**

Supreme Court Of Canada Recognizes A Constitutional Right To Strike

In an historic win for workers' rights, the highest court in Canada has recognized constitutional protection for the right to strike. In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court of Canada recognized (5:2 majority) that the workers' right to strike is an essential part of a meaningful collective bargaining

process. The Court ruled that "[a]long with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d)" of the *Charter*.

Right To Strike Advances *Charter* Values

Emphasizing that the right to strike is essential to realizing the *Charter* values of human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy, the Court overturned nearly 30 years of jurisprudence which had denied constitutional protection for the right to strike. The Court for the first time acknowledged the fundamental nature of the freedom of workers to collectively withdraw their labour:

> Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives ... The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

Government's Substantial Interference With The Right To Strike In Breach Of Section 2(d)

According to the Court, government laws or action which substantially interfere with the right to strike infringe s. 2(d) of the *Charter*, which now guarantees the freedom of workers to collectively withdraw their labour. As noted by the Court, "the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining".

In the case at bar, the government enacted essential services legislation which gave public employers the authority to unilaterally designate which public services it considers to be essential, the classifications of employees required to continue to work during a work stoppage, and the names and number of employees in each of the classifications. This resulted in public employers deeming all but a minority of the employees in its bargaining units as performing essential services (even though not all of the services were in fact essential), effectively prohibiting those employees from exercising their right to strike. The Court concluded that the legislation substantially interfered with the employees' right to strike and was therefore in breach of s. 2(d) of the *Charter*.

Government Interference With Right To Strike Not Justified

The Court found that the government's breach of s. 2(d) of the *Charter* was not justified under s. 1. While the maintenance of essential public services was found to be an important legislative objective, the legislation itself was not carefully tailored to minimize the impairment of workers' s. 2(d) rights for two reasons.

First, the legislation did not provide for effective oversight of the employer's essential service designations, in order to ensure that only those services that are truly essential are maintained. Under the impugned legislation, the Saskatchewan Labour Relations Board had limited jurisdiction to review the numbers of employees required to work in a given classification during a strike, and had no authority to review whether any particular service is essential, which classifications involve the delivery of genuinely essential services, or whether specific employees named by the employer to work during the strike have been reasonably selected. The legislation therefore went beyond what was required to ensure the uninterrupted delivery of essential services during a strike.

Second, the Court held that where strike action is substantially limited by the government, it must be replaced by a meaningful dispute resolution mechanism that is commonly used in labour relations. Under the impugned legislation, there was no access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration, which further exacerbated the infringement of the employees' *Charter* rights.

The Court concluded that the legislation was unconstitutional and declared it no force or effect. The Court however suspended its declaration of invalidity for one year.

Government Interference With Certification Process Not Unconstitutional

The Court also considered the constitutionality of separate piece of legislation, Saskatchewan's *Trade Union Amendment Act*. This legislation introduced stricter requirements for a union to be certified by increasing the required level of written support from 25% to 45% of employees; by reducing the period for receiving written support from the employees from six months to three; and by eliminating the automatic certification previously available when over 50% of the employees had given written support prior to the application. The legislation also removed the Saskatchewan Labour Board's discretion to decide whether a representation vote by secret ballot was needed. Finally, the Act decreased the level of employee support required for decertification.

The Court found that the government's amendments to the process by which unions may obtain (or lose) the status of a bargaining representative do not substantially interfere with the freedom to freely create or join associations protected under s. 2(d) of the *Charter*. In this regard, the Court was persuaded by the trial judge’s findings that when compared to other Canadian labour relations statutory schemes, the amendments did not create an excessively difficult threshold such that the workers’ right to associate is substantially interfered with.

Overall, the *Saskatchewan Federation of Labour* decision is a huge victory for workers' rights and the labour movement as a whole.

***Mounted Police Association of Ontario v. Canada (A.G.)*, 2015 SCC 1**

Supreme Court Recognizes Constitutional Protection For Employee Choice And Independence

In a significant victory for workers, the Court ruled (6-1) that members of the RCMP have a constitutional right to be represented by an association of their choosing that is independent from management. In *Mounted Police Association of Ontario v. Canada (A.G.)*, the Court held that s. 2(d) of the *Charter* protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests.

Section 2(d) Protects Collective Bargaining Process That Is Meaningful

Notably, the Court reaffirmed the generous, purposive and contextual approach to s. 2(d) of the *Charter* that was first articulated in *Dunmore v. Ontario*, reinforced in *Health Services*,[1] and then retrenched in *Ontario v. Fraser.*[2] The Court reviewed its previous jurisprudence and reaffirmed that s. 2(d) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Viewed purposively, the Court found that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, including the right to collectively bargain, and that the government cannot enact laws or impose a labour relations process that substantially interfere with those rights.

Court Rejects "Derivative Rights" Theory Of Collective Bargaining And "Effective Impossibility" Test

Significantly, in addition to reaffirming that s. 2(d) protects collective rights, the Court clarified the right to collective bargaining in two important respects. First, the Court rejected the notion that collective bargaining is merely a derivative right, that lies outside the core of freedom of association under s. 2(d), as had been argued by various governments. Rather, the Court held that collective bargaining is a necessary precondition to the meaningful exercise of the constitutional guarantee of freedom of association. The Court emphasized that, while the right does not guarantee a particular bargaining outcome or access to a particular model of labour relations, s. 2(d) does guarantee a meaningful process of collective bargaining.

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[1] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94; and *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

[2] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

Second, the Court rejected the "effective impossibility" test advanced by governments since *Fraser*. Under that test, collective bargaining is protected only if state action makes it *effectively impossible* to associate with respect to workplace matters. The Court reaffirmed that the threshold for finding an infringement of freedom of association is substantial interference. Where state action substantially interferes with the right of employees to associate in the meaningful pursuit of collective workplace goals, it will infringe s. 2(d) of the *Charter*.

Constitutional Requirements For Employee Choice And Independence Under Section 2(d)

According to the Court, a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. The Court noted that employee choice and independence are not absolute. First, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Second, the degree of independence required by the *Charter* is one that ensures that the activities of the association are aligned with the interests of its members.

The Court emphasized that the constitutional "requirements of choice and independence can be respected by a variety of labour relations models, as long as such models allow collective bargaining to be pursued in a meaningful way." What is required to permit meaningful collective bargaining varies with the industry culture and workplace, and as a result, the ultimate question to be determined is whether the measures disrupt the balance power between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with a meaningful collective bargaining process.

RCMP Labour Relations Regime Violates Principles Of Choice And Independence

In applying these principles to the case at bar, the Court held that the impugned regime substantially interfered with the right of RCMP members to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free of employer control.

Under the federal labour relations regime for RCMP members, employees are not permitted to unionize or engage in collective bargaining and are excluded from the labour relations scheme governing the federal public service, namely the *Public Service Labour Relations Act* ("*PSLRA*"). Instead, members of the RCMP are subject to a non-unionized labour relations scheme in which they are not able to represent themselves on issues of wages and working conditions through a freely chosen association that is independent from management. The only form of employee representation recognized by management (and imposed on RCMP members by legislation) is a Staff Relations

Representative Program ("SRRP") which "consults" on labour relations matters (excluding wages). While there is some elected employee representation on the SRRP, the body is not independent of management and the final word on workplace issues rests with management.

The Court found that under the impugned regime RCMP members were represented by an organization they did not choose or control, and that lacked independence from management. In short, the impugned regime imposed on RCMP members a scheme that did not permit them to choose their own association and to identify and advance their workplace concerns free from management's influence.

The Court concluded that the impugned regime is inconsistent with s. 2(d) of the *Charter*, and fails to respect RCMP members' freedom of association in both its purpose and its effects. The Court further found that the exclusion of RCMP members from the application of the *PSLRA* infringed the rights of RCMP members to associate under s. 2(d) of the *Charter*. The Court held that the very purpose of the exclusion was to deny RCMP members the exercise of their freedom of association and that this impermissibly breached their constitutional rights.

Government Infringement Of Section 2(d) Not Justified

Furthermore, the Court found that the impugned regime was not justified under section 1 of the *Charter.* The Court held, that while the government's objective of maintaining an independent and objective police force constitutes a pressing and substantial objective, the infringing measures were not rationally connected to their objective because (1) it was not apparent how the exclusion of RCMP members from a statutorily protected collective bargaining process ensures the neutrality, stability or even reliability of the Force and (2) it was not established that permitting meaningful collective bargaining for RCMP members would disrupt the stability of the police force or affect the public's perception of its neutrality. The Court also determined that denying RCMP members any meaningful process of collective bargaining was more restrictive than necessary to maintain the Force's neutrality, stability and reliability, and that because there was no material difference between the RCMP and other police forces across Canada (all of which have collective agreements), it was clear that total exclusion of RCMP members from meaningful collective bargaining was not minimally impairing. The Court accordingly declared the offending provisions of no force or effect, suspending the declaration for a period of twelve months.

***Meredith v. Canada (Attorney General)*, 2015 SCC 2**

Supreme Court Rules Wage Restraint Legislation Does Not Violate Section 2(d)

A 6-1 majority of the Supreme Court of Canada held that federal wage restraint did not breach s. 2(d) of the *Charter*. The Court released its decision in *Meredith* concurrently with the *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015

SCC 1 ("*MPAO*"). In the latter case, the Court ruled that the RCMP's labour relations regime was unconstitutional. The Court in *Meredith* found that the same labour relations regime which led to the scheduled wage increases and which was found to be constitutionally deficient in *MPAO* nevertheless constituted associational activity that attracts *Charter* protection.

Factual Background

At issue in *Meredith* was whether federal wage restraint legislation violated RCMP members' freedom of association under s. 2(d) of the *Charter*. In 2009, in the midst of an economic crisis, the federal government enacted the *Expenditure Restraint Act* ("*ERA*") which legislated caps on wage increases across the federal public sector for several years. Upon coming into effect, the *ERA* rolled back scheduled wage increases for RCMP members that had been previously agreed to by the Treasury Board following an extensive consultation process. RCMP members challenged the law on the basis that it violated their constitutional right to collective bargaining, as recognized by the Supreme Court of Canada in *Health Services*, 2007 SCC 27.

Specifically, the *ERA* imposed salary increases across the federal public sector of 1.5% in each of 2008, 2009 and 2010.[3] This had the effect of rolling back the RCMP's wage increases of between 2% and 3.5% that had been previously agreed to by the Treasury Board. Unlike most other bargaining units in the federal public sector, the *ERA* contained an exception for RCMP members which permitted the payment of certain allowances in addition to the legislated wage increases. Notably, RCMP members were able to obtain increases in allowances following the enactment of the *ERA*, including an increase in service pay from 1% to 1.5% for every five years of service and an extension of the allowance to certain civilian members.

Wage Restraint Legislation Did Not Substantially Interfere With RCMP "Bargaining" Process

In a relatively brief analysis, the Court ruled that the *ERA* did not substantially interfere with the RCMP members' right to free collective bargaining for the following reasons. First, the level at which the *ERA* capped wage increases for RCMP members was consistent with the going rate reached in agreements concluded with bargaining agents inside and outside of the core public administration and therefore reflected an outcome consistent with the actual bargaining processes.[4] Second, the rollbacks applied for a limited three-year period. Finally, the *ERA* did not preclude consultation on other compensation-related issues and indeed permitted the negotiation of additional allowances for RCMP members. While the Court noted that actual outcomes of bargaining are not determinative of a s. 2(d) analysis, as freedom of association

[3] For those bargaining units in the public sector that had not completed bargaining for 2006 and 2007, the *ERA* imposed wage increases of 2.5% and 2.3% respectively for these years.

[4] The Court did not address the fact that the *ERA* imposed the exact same wage caps on bargaining units across the federal public sector, both inside and outside the core public administration.

protects a right to a meaningful process and does not guarantee a particular bargaining result, the Court nevertheless found that the evidence of the outcomes achieved by the RCMP supported a conclusion that the enactment of the *ERA* had a minor impact on their associational activity. The Court concluded that the "*ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members."

Justice Abella Dissents

In dissent, Justice Abella found that the government's unilateral decision to roll back agreed upon RCMP wage increases through the *ERA* substantially interfered with s. 2(d) of the *Charter*. In contrast to the majority, Abella J. emphasized the following factors: (1) the agreed to wage increases were the result of an extensive consultation process between the RCMP and the government; (2) ensuring fair wages is among the key purposes of collective bargaining; and (3) RCMP members did not have a meaningful opportunity to make representations about the extent and impact of the rollbacks before they were imposed. Abella J. concluded that the *ERA* had the effect of nullifying the right to a meaningful consultation process and amounted to substantial interference with the bargaining process.

Commentary

The Court's analysis in *Meredith* turns on the specific facts of the case, including the idiosyncratic (and constitutionally deficient) RCMP labour relations regime and the specific exception carved out in the *ERA* for RCMP allowances. The *Meredith* case essentially amounts to a finding by the Court that the government action did not substantially interfere with the limited "consultation" process that the RCMPs had. The decision nevertheless suggests that it may be difficult for trade unions to challenge wage restraint legislation under s. 2(d) of the *Charter*, particularly where the wage restraint legislation is time-limited, imposes a wage increase that is not unreasonable, permits free negotiation of other important workplace issues, and involves government consultation prior to its enactment.

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Paul Cavalluzzo and Adrienne Telford represented the Canadian Union of Postal Workers and the International Association of Machinists and Aerospace Workers before the Supreme Court of Canada in the *Saskatchewan Federation of Labour* appeal. They also assisted in the coordination and litigation strategy of the labour-side parties and interveners in the *Mounted Police Association of Ontario* appeal before the Supreme Court of Canada.

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