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Supreme Court Extends Constitutional Protection to Collective Bargaining Process

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INTRODUCTION

On June 8, 2007, the Supreme Court of Canada issued a ground-breaking decision in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* (referred to below as the *Health Services* decision). In this decision, a 6:1 majority of the Supreme Court of Canada departed from its past rulings, and held that the guarantee of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") includes protection of the collective bargaining process.

The Supreme Court recognized that collective bargaining is constitutionally-protected "associational activity", whereby workers unite to discuss common workplace objectives with the employer. The Court concluded that the B.C. Government infringed s. 2(d) of the *Charter* by enacting legislation which substantially interfered with fundamental collective agreement rights without first engaging in good faith negotiation or consultation with affected unions. The Court further found that this infringement could not be justified under s. 1 of *Charter*. Several provisions of the legislation were declared invalid, but the declaration of invalidity was suspended for 12 months to provide the B.C. Government with an opportunity to address the repercussions of the Court's decision.

The impact of the *Health Services* case will be felt most deeply in the broader public sector, where employer action is subject to review under the *Charter*, even where there is no legislation involved. However, the significance of the decision is not limited to the public sector. In the course of its decision, the majority made some important comments on collective bargaining and the collective bargaining process of which all unionized employers should be aware.

THE FACTUAL CONTEXT: *THE HEALTH AND SOCIAL SERVICES DELIVERY IMPROVEMENT ACT*

The *Health Services* case involved a challenge to the *Health and Social Services Delivery Improvement Act* ("the *Act*"), which was introduced by the B.C. Government in 2002. The majority of the Supreme Court was quite critical of both the content of this legislation and the process the B.C. Government followed in enacting it. The majority's evident disapproval of the B.C. Government's approach no doubt influenced the breadth of its statements regarding the constitutional protections attaching to the collective bargaining process.

In British Columbia, collective bargaining in the health sector occurs on a sectoral basis. Health sector employers are

required by statute to be members of the Health Employers Association of British Columbia ("HEABC"). The HEABC is an accredited employers' association that engages in collective bargaining with a variety of trade unions representing health sector employees. While the Ministry of Health is not a party to this collective bargaining process, it provides a substantial amount of the funding utilized by health sector employers to meet operating costs, including labour costs. As such, the Ministry has an obvious interest in the outcome of collective bargaining in the sector.

The *Act* was adopted by the B.C. Government in response to a "crisis of sustainability" in the B.C. health care system. It was common ground between the parties that the B.C. Government needed to take swift and decisive action to control spiralling health care costs. However, the means chosen by the Government to pursue this objective proved highly controversial amongst health sector unions and employees.

One of the goals of the *Act* was to "facilitate the efficient management of the workforce in the health care sector". This goal was achieved by removing collective agreement barriers to restructuring which (it was argued) were preventing health sector employers from delivering services more efficiently and cost-effectively. The *Act* altered or invalidated existing collective agreement provisions establishing transfer and multi-worksite assignment rights, contracting out restrictions, job security programs, layoff and bumping requirements, as well as provisions requiring notice to or consultation with trade unions. The *Act* did not merely alter or invalidate existing rights, but also precluded the parties (at least in some instances) from negotiating similar provisions in the future.

The legislation was passed very quickly, and came into force only 3 days after it was first introduced in the Legislature. The majority found that there was "no meaningful consultation" with the affected unions before the legislation was passed. Indeed, the majority noted that the Government's only contact with the affected unions before the legislation was passed was a telephone call from the Minister of Health to a union representative, approximately 20 minutes prior to the introduction of the legislation, advising that the Government was about to introduce legislation dealing with employment security and other provisions of the collective agreements. As will seen below, this lack of consultation with the affected unions was an important factor underlying the majority's decision to strike down several provisions of the *Act*.

Interestingly, the dissenting judgment by Justice Deschamps paints a different picture of the factual context leading to the introduction and passage of the legislation. She commented on the history of "volatile" and "acrimonious" labour relations in British Columbia's health sector, and made reference to the labour disputes which had greeted the HEABC's earlier attempts to negotiate collective agreement amendments designed to control costs. Justice Deschamps also noted that the B.C. Government had considered but rejected a number of alternative approaches advocated by health sector employers (such as across-the-board pay reductions) on the basis that these alternatives would undermine established collective agreement rights without contributing to the long-term viability of the B.C. health care system. In Justice Deschamps' view, the B.C. Government had resorted to the *Act* only after attempts at free collective bargaining had failed, and then in a manner which attempted to balance the competing perspectives of health sector employers and employees.

COLLECTIVE BARGAINING PROTECTED BY THE *CHARTER*

Since the *Charter* first came into force more than 25 years ago, the Supreme Court has consistently declined to extend the guarantee of freedom of association to the collective bargaining process. However, the Supreme Court's 2001 decision in *Dunmore v. Ontario* paved the way for a reconsideration of its earlier case law. In the *Health Services* case, the Supreme Court took the *Dunmore* analysis to the next step, holding that its earlier decisions excluding the collective bargaining process from constitutional protection could no longer withstand principled scrutiny and should not be followed.

In *Dunmore*, the Supreme Court held that a provision of the *Labour Relations Act* excluding agricultural workers from participating in collective bargaining infringed their freedom of association, contrary to s. 2(d) of the *Charter*. The Court held that workers' choice to join together to make collective representations to their employer about the terms and conditions of employment was constitutionally-protected "associational activity". In the Court's view, this associational activity was sufficiently fundamental to the freedom of association that it must be protected in order to make the freedom a meaningful one. The legislative provision excluding agricultural workers from the statutory scheme under the *Labour Relations Act*

effectively precluded meaningful participation in this fundamental associational activity, and was therefore contrary to s. 2(d) of the *Charter*. However, in *Dunmore*, the Supreme Court was careful to note that not all collective activities carried out through unions or other associations are sufficiently fundamental to the freedom of association to receive constitutional protection, specifically identifying collective bargaining as a collective activity that was not deserving of constitutional protection. Thus, while the *Dunmore* case extended the protection of s. 2(d) of the *Charter* to certain associational activities carried on in the workplace, it clearly stopped short of extending the protection of s. 2(d) to the collective bargaining process.

In the *Health Services* case, the Supreme Court took the next step and recognized that the guarantee of freedom of association includes protection of "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining". Again, the Court was careful to note that this protection is not without limits.

First, the *Charter* – and thus the guarantee of freedom of association in s. 2(d) – applies only to government action. As a result, the constitutional protection of the collective bargaining process is triggered only where the government is acting as the employer (as is the case throughout the broader public sector) or where the government has passed legislation with respect to collective bargaining.

Second, the Supreme Court emphasized that the freedom of association only protects the associational activity of employees joining together to pursue common workplace objectives. It guarantees to employees the right to unite, present their demands collectively, and engage in discussions with the employer in an attempt to achieve their objectives. It obliges the employer to meet with employees and discuss their demands. However, it does not guarantee a particular process of collective bargaining, nor does it guarantee that employees' objectives will be achieved.

Third, s. 2(d) does not protect all aspects of the collective bargaining process. It protects only against "substantial interference" with associational activity. Substantial interference will be found only where the intent or the effect of the interference is to discourage the collective pursuit of common goals. Stated another way, "the interference … must be substantial – 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". Although each case must be considered on its own facts, the Court noted that [a]cts of bad faith or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation" may result in substantial interference with associational activity.

THE TEST FOR "SUBSTANTIAL INTERFERENCE"

The majority of the Supreme Court established a two-step test for determining whether government action amounts to substantial interference with the associational activity of collective bargaining:

The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

The Court made clear that both inquiries are necessary in every case:

If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.

(A) IMPORTANCE OF THE SUBJECT MATTER

At the first stage of inquiry, the essential question to be determined is "whether the subject matter of a particular instance of

collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively". This question leads to a consideration of the importance of the issue to the union and its members, and particularly to their ability to pursue their objectives on a collective basis. The more important the issue is to the union and its members, the more likely it will be that government action will interfere with the freedom of association. On the other hand, the less important the issue is to the union and its members, the less likely it is that government action will interfere with the freedom of association.

In an effort to provide some guidance concerning the kind of issues which will typically be important enough to the collective bargaining process to engage the freedom of association, the majority held as follows:

While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining over these matters undermines the capacity of union members to pursue shared goals in concert….

This statement is somewhat perplexing, as it is equally difficult to imagine why issues like the design of the uniform, the layout and organization of cafeterias, or the location or availability of parking lots would ever be the subject of collective bargaining.

(B) IMPACT ON GOOD FAITH NEGOTIATION AND CONSULTATION

At the second stage of the inquiry, it is necessary to consider whether the government action respects what the Supreme Court called "the fundamental precept of collective bargaining – the duty to consult and negotiate in good faith". The Court noted that the duty to bargain includes the duty to meet and discuss proposals, to engage in meaningful dialogue, and to demonstrate a willingness to exchange and explain proposals. However, the duty to bargain does not include a duty to agree to any specific contractual provisions, nor does it obligate the parties to conclude a collective agreement. The Court recognized that "hard bargaining" is permitted, while "surface bargaining" ("when an examination of the content of the bargaining shows hostility from one party toward the collective bargaining process") is contrary to the duty to bargain in good faith. The Court also accepted that "[s]ituations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith" and "failure to comply with the duty to consult and bargain in good faith should not be lightly found". However, the Court concluded that "there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line."

THE MAJORITY'S CONCLUSIONS

The provisions of the *Act* that were challenged dealt with transfer and reassignment of employees (ss. 4 and 5), contracting out (s. 6), job security programs (ss. 7 and 8), and layoff and bumping rights (s. 9). The majority found that all of the provisions at issue except those dealing with job security programs and certain provisions dealing with contracting out interfered with existing collective agreement rights and/or future collective bargaining. The Court found that the provisions of the *Act* dealing with transfers and reassignments made "relatively minor modifications" to existing collective agreement provisions, leaving significant protections in place, and therefore did not amount to substantial interference with the unions' ability to engage in collective bargaining. In contrast, one of the provisions in the *Act* dealing with contracting out , as well as the provisions dealing with layoff and bumping rights, interfered with matters "central to the freedom of association". The majority put the matter this way:

Restrictions in collective agreements limiting the employer's discretion to lay off employees affect the employees' capacity to retain secure employment, one of the most essential protections provided to workers by their union. Similarly, limits in

collective agreements on the management rights of employers to contract out allow workers to gain employment security. Finally, bumping rights are an integral part of the seniority system usually established under collective agreements, which is a protection of significant importance to the union…. Viewing the *Act's* interference with these essential rights in the context of the case as a whole, we conclude that its interference with collective bargaining over matters pertaining to contracting out, layoff conditions and bumping constitutes substantial interference with the s. 2(d) right of freedom of association.

The majority also concluded that the process the B.C. Government had followed in enacting the *Act* – and specifically the provisions found to violate s. 2(d) – did not preserve the process of good faith negotiation and consultation with unions. The *Act* included provisions relieving health sector employers of their collective agreement obligations to engage in consultation with or provide notice to unions prior to contracting out or laying off or bumping employees. While the majority recognized that "the government was facing a situation of exigency" and "was determined to come to grips with the spiralling cost of health care in British Columbia", it had adopted measures which constituted "a virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation".

As a result of these findings, the majority held that certain provisions of the *Act* dealing with contracting out and the layoff and bumping provisions of the *Act* infringed s. 2(d) of the *Charter*. The majority then considered whether these provisions could be justified under s. 1 of the *Charter* on the basis that they constituted "reasonable limits prescribed by law [that] can be demonstrably justified in a free and democratic society". The majority accepted that the B.C. Government's objectives were pressing and substantial, and that the means chosen by the government were rationally connected to its objectives. However, the majority held that the measures chosen by the Government did not minimally impair the *Charter* rights in question. In this regard, the Court noted that there was evidence on the record that health sector employers had presented the Government with a range of options concerning measures to address the health care crisis. However, the Government had not presented any evidence as to why it had chosen to proceed in the manner it did, nor had it presented any evidence concerning why it had not consulted with unions about this range of options before introducing the *Act*. Although the majority expressly stated that "[l]egislators are not bound to consult with affected parties before passing legislation", the lack of meaningful consultation with trade unions nevertheless proved fatal to the Government's s. 1 argument:

The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in any meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the *Act*, and had conveyed to the government that the matters to be dealt with under the *Act* were of particular significance to them. Indeed, the government had indicated a willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within the half hour before the *Act* (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.

This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

Having rejected the B.C. Government's s. 1 argument, the majority declared several provisions of the *Act* unconstitutional, but suspended the declaration for 12 months to allow the Government an opportunity to respond to the decision.

JUSTICE DESCHAMPS' PARTIAL DISSENT

As noted, Justice Deschamps dissented in part from the majority view. She applied a different test for determining whether

government action had infringed s. 2(d) of the *Charter*. Under the test she preferred, the first question was whether there had been interference with the process of negotiation. Only if the first question was answered in the affirmative would the court consider whether the issues involved were significant. In her view, only interference with respect to significant workplace issues could give rise to an infringement of s. 2(d). Justice Deschamps' application of s. 1 (and, in particular, the "minimal impairment" requirement) was also more sympathetic to the Government's arguments. While she found that many of the impugned provisions infringed s. 2(d), she ultimately concluded that all of the provisions except s. 6(4) of the *Act* (which nullified collective agreement provisions requiring consultation prior to contracting out) were saved by s. 1.

CONCLUDING COMMENTS

The Supreme Court's ruling in the *Health Services* case is framed in extremely broad terms and would appear to extend the protections of s. 2(d) well into the realm of collective bargaining. The hierarchy of bargaining issues the decision seems to create, wherein certain issues are viewed as central to the associational activity protected by s. 2(d) based on their importance to the union and its members, and the considerable emphasis placed on consultation with trade unions, also represent significant shifts in the legal landscape. While *Charter* review is limited to government action, both the "*Charter* values" reflected in the decision and some of the Court's broader discussion of the collective bargaining process could well have implications outside the broader public sector.

Your Hicks Morley lawyer would be pleased to advise you on the impact this decision will have on your organization.

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