Case In Point

Federal Wage Restraint Legislation Does Not Infringe Section 2(d) of Charter

Date: September 5, 2012

Underscoring once again that section 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") only guarantees a meaningful process of collective bargaining and not a particular result, the Ontario Court of Appeal recently found that wage restraint legislation effectively prohibiting salary increases over a five-year period was not, in and of itself, unconstitutional. Association of Justice Counsel v Canada (Attorney General) is one of several recent cases marking the ongoing evolution of freedom of association rights in the labour relations context since the Supreme Court of Canada's *B.C. Health Services* decision.

In 2006, the Association of Justice Counsel ("AJC") became the certified bargaining agent for approximately 2,700 lawyers employed with the federal government. It served a notice to bargain in May 2006, and immediately sought wage parity with its provincial counterpart (a 35% increase) from the Treasury Board Secretariat ("TBS"), the administrative body responsible for negotiating terms and conditions of employment with bargaining agents for federal public service employees. The parties met numerous times, but reached impasse after the AJC ultimately rejected the TBS' wage increase proposals and final offer. The matter was referred to arbitration. In 2009, prior to the arbitration on the merits, the federal *Expenditure Restraint Act* came into force and prohibited any salary increases above the final TBS offer. At arbitration, the AJC was awarded the maximum salary increases permitted by the legislation. The increases were subsequently implemented in a collective agreement.

The AJC successfully challenged the *Expenditure Restraint Act* in the Ontario Superior Court of Justice. That Court ruled that the legislation infringed the AJC members' *Charter* rights—and specifically, their freedom of association—by taking wage increases off the table, thereby rendering collective bargaining on salary "useless." However, the Court found that the legislation was "saved" by section 1 of the *Charter* for all years but 2006-2007 because of the government's need to respond to the global financial crisis of 2008.

The Ontario Court of Appeal disagreed. Referring to the majority decision in the Supreme Court of Canada's ruling in *Fraser*, which the Court of Appeal interpreted as "clarif[ying] and limit[ing]" the decision in *B.C. Health Services*, it noted that section 2(d) guarantees a meaningful process, not a particular result. The Court then considered its own recent ruling in *Mounted Police Association of Ontario*, where it held that "*Fraser* should be interpreted as establishing that it is only where legislation, or the lack thereof, renders the pursuit of collective goals 'effectively impossible' that a claim that s. 2(d) obliges the government to take positive action is made out."

In this case, the AJC and the TBS had engaged in a lengthy, two-year collective bargaining process by the time the *Expenditure Restraint Act* came into force. The AJC did not allege that the TBS failed to meet and bargain in good faith, as required by the *Public Service Labour Relations Act*. While the TBS adopted a tough bargaining position, there was no evidence that the AJC was denied the full opportunity to present the wage demands of its members, nor was it established that the TBS failed to consider those demands. As the Court of Appeal noted, *Fraser* "does not require the parties to conclude an agreement or accept any particular terms, and the AJC therefore cannot claim that s. 2(d) was violated because the process of collective bargaining failed to yield an agreement."

The Court allowed the appeal, finding that the AJC failed to demonstrate that the *Expenditure Restraint Act* infringed the rights of its members to engage in a meaningful process of collective bargaining.

As this latest case illustrates, the scope of the section 2(d) right to freedom of association in the labour relations context has continued to evolve since the landmark decision of the Supreme Court of Canada in *B.C. Health Services*, which first

established that the right to collectively bargain was constitutionally protected under the *Charter*'s freedom of association guarantee. While the majority decision in *Fraser* and more recent Ontario Court of Appeal jurisprudence have lent clarity to that decision and the scope of freedom of association in the collective bargaining context, the debate is likely to continue.

For a discussion of other section 2(d) cases, including *Fraser* and the *Mounted Police Association of Ontario*, please see "Freedom of Association Under the *Charter*: Snake or Tree?" in our Summer 2012 issue of *FTR Quarterly*.