



NEWSLETTER – JUNE 2007

FREEDOM OF ASSOCIATION

On June 8, 2007, the Supreme Court of Canada issued a very important decision regarding the application of section 2(d) of the *Canadian Charter of Rights and Freedoms* to collective bargaining. Section 2(d) protects the “freedom of association” of Canadian citizens.

In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, the Court held, in a six-to-one majority decision, that section 2(d) protects the “process” of collective bargaining against “substantial interference” through governmental action. The Court held, in particular, that certain aspects of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 (“Bill 29”) are contrary to section 2(d) and, therefore, unconstitutional.

The decision addressed union arguments that Bill 29 violated section 2(d) by voiding negotiated collective agreement protections against contracting out and lay-off, and preventing unions from bargaining similar protections in the future. In a surprising move, the Court overturned much of the reasoning in an earlier “trilogy” of Supreme Court of Canada decisions in which the Court held that section 2(d) did not protect the right to strike or bargain collectively.

The Court held that section 2(d) does provide limited protection from interference in collective bargaining because:

- collective bargaining was a fundamental aspect of Canadian society even before modern labour legislation was passed, and was “part of freedom of association in the labour context” when the *Charter* came into force in 1982;
- Canada has signed and ratified international documents that recognize a fundamental right to collective bargaining; and
- collective bargaining protection under section 2(d) is consistent with underlying *Charter* values: human dignity, equality, liberty, respect for autonomy of the person, and enhancement of democracy.

The Court confirmed, however, that section 2(d) affords only limited protection of collective bargaining rights. In particular, section 2(d):

- protects the collective bargaining “process”, and not the “substantive or economic outcome” of bargaining;

- protects the right to a general process of collective bargaining, and not a particular bargaining model or method; and
- limits only “substantial interference” in collective bargaining – that is, interference not only with the attainment of a certain bargaining objective, but the very process enabling individuals to join together to pursue these objectives.

The Court held that “substantial interference” is identified by analyzing the following two factors in a contextual and fact-specific manner:

- the importance of the matter affected to the process of collective bargaining and capacity of union members to come together and pursue collective goals in concert (that is, the importance of the matter at issue to collective bargaining generally); and
- the manner in which the measure impacts on collective rights to good faith negotiation and consultation (that is, the manner in which the measure interferes).

The Court provided examples of governmental action that may constitute substantial interference with the process of collective bargaining contrary to section 2(d):

- legislation that denies an entire group of workers access to collective bargaining (the Court cited its earlier decision that Ontario legislation excluding farm workers from collective bargaining was unconstitutional);

- acts of bad faith;
- a unilateral nullification of negotiated terms, without any process of meaningful discussion or consultation;
- a refusal to bargain in good faith; and
- legislation that prevents or denies discussion about working conditions (although the Court confirmed that measures regarding minor issues like “uniform design, cafeteria organization or parking lots” would likely not constitute substantial interference).

The Court also ruled that situations of exigency and urgency may affect the content of the duty to consult and bargain in good faith, and that “failure to comply with the duty to consult and bargain in good faith should not be lightly found”.

Finally, the Court made a general comment that substantial interference with the process of collective bargaining contrary to section 2(d) may be “saved” by section 1 of the *Charter* (which permits infringement of fundamental freedoms only if “demonstrably justified in a free and democratic society”). The Court indicated that section 1 exceptions would occur “on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis”.

The Court applied the above principles to the sections of Bill 29 at issue, and held that many of the provisions did not contravene section 2(d) because the terms:

- affected only minor rights respecting transfers and relocation, and did not

completely remove all such protection;

- only modified the application of certain *Labour Relations Code* protections, and not rights flowing from collective bargaining; or
- nullified terms imposed by previous governments, and not those freely bargained.

The Court held, however, that the following sections of Bill 29 did contravene section 2(d):

- section 6(2), which prevents any collective agreement protection against contracting out in health sector agreements, now or in future;
- section 6(4), which prevents any health sector collective agreement requirement to consult with unions in advance of contracting out, now or in future; and
- section 9, which prevented, until December 31, 2005, health sector collective agreement limits on employer rights to lay-off employees or health sector collective agreement bumping rights inconsistent with regulations passed under Bill 29.

The Court held that the above sections constituted substantial interference because they:

- addressed matters of job security and seniority central to the freedom of association; and
- constituted an absolute prohibition on contracting out protection, including even a limited right to advance consultation (thus

eliminating the right of workers to work in association to address the issue of contracting out).

The Court further held that the substantial interference caused by sections 6(2), 6(4) and 9 was not saved by section 1 of the *Charter*. The Court accepted that the objective of Bill 29 (that is, the improvement of health service delivery by allowing health authorities to focus resources on clinical services and increase flexibility and accountability) was “pressing and substantial”. Interestingly, the Court expressed skepticism about whether other arguable objectives such as cutting costs and increasing management rights would satisfy the test. The Court also accepted that the legislation was “rationally connected” to the pressing and substantial objectives, but held that the sections did not “minimally impair” section 2(d) rights because:

- section 6(2) voids absolutely any manner of restriction on contracting out;
- section 6(4) voids even an obligation to consult – clearly not preserving collective bargaining rights as much as possible;
- the temporariness of section 9 restrictions provided “scant comfort” to employees laid off or bumped “without the benefit of a union to represent them on the issue”;
- the record did not evince governmental effort to find minimally impairing measures, or show why the B.C. government chose the option it did from a range of other options; and

- there was no meaningful consultation with the unions about alternate ways to meet the pressing and substantial objectives.

In some welcome good news for employers, the Court completely dismissed the union argument that Bill 29 offends the section 15 *Charter* “guarantee of equality under the law”. The Court held that, while Bill 29 does segregate and differentially treat different sectors of employment, that segregation and differential treatment is based on the work people do, and not the people who do the work.

In the result, the Court declared sections 6(2), 6(4) and 9 of Bill 29 unconstitutional, but suspended the declaration for a period of twelve months to allow the B.C. government to address the “repercussions” of the decision.

It is too soon to tell what action the B.C. government will take to bring Bill 29 into line

with the requirements of the *Charter*. It is likely that some form of negotiation or consultation will take place with the affected unions. It is noteworthy that the Court commented, in the context of its section 1 *Charter* analysis, that “[a] more refined provision, for example, permitting contracting out after meaningful consultation with the union, might be envisaged”. The government may well pursue the form of refinement suggested by the Court.

This decision will also have important ramifications on current and future cases regarding contracting out and back-to-work legislation. Employers should expect unions to raise *Charter* section 2(d) in any case involving the right to bargain collectively, including, in particular, the interpretation of any legislation that affects or allegedly “substantially interferes” with that right.

If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

ROPER GREYELL MORNING EDUCATION SERIES – UPCOMING SEMINARS

We are very pleased to be able to offer the following Roper Greyell Morning Education Series workshops in the upcoming months:

- “Occupational Health and Safety – Employer’s Duty to Investigate, Criminal Liability and Managing Your Experience Rating”
September 14 and 28, 2007 – 7:30 to 9:00 a.m. at the offices of Roper Greyell LLP
- “Important Issues in Employment Contracts”
November 9 and 23, 2007 – 7:30 to 9:00 a.m. at the offices of Roper Greyell LLP

Please note that space for the above workshops is limited.

Remaining places can be reserved on a “first come, first served” basis by telephoning Catherine MacLeod at (604) 806-3871 or e-mailing her at cmacleod@ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *