CAVALLUZZO

October 21st, 2015

CASE LAW UPDATE: AN HISTORIC WIN FOR WORKERS' RIGHTS

The Supreme Court Of Canada Releases New Labour Trilogy

The Supreme Court of Canada released three decisions in 2015 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 are– *Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada*, and *Meredith v. Canada* . The Mounted Police case is summarized below:

***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.

---

[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.

CAVALLUZZO SHILTON MCINTYRE CORNISH LLP