

CONSTITUTIONAL PROTECTION FOR COLLECTIVE BARGAINING

Health Services & Support-Facilities Subsector Bargaining Assn. V. British Columbia
Supreme Court of Canada
Judgment Rendered: June 8, 2007

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In this landmark decision, the Supreme Court of Canada overturned two decades of Charter jurisprudence and declared that collective bargaining is constitutionally protected under the freedom of association, section 2(d), of the Charter. All seven justices who heard the case concluded that the British Columbia government had infringed the constitutionally-protected rights of employees in the health care sector when it passed legislation that substantially interfered with collective bargaining rights without first consulting or negotiating with affected unions. The single dissenting judge concurred with the result, but would have applied a different analysis to reach the same conclusion.

Of importance, the Court expressly limited the extent of the protection for collective bargaining under s. 2(d) of the Charter. Specifically, the protection does not guarantee either a particular outcome in a labour dispute or access to any particular statutory regime. What is protected is the right of employees to engage in a process of collective bargaining to achieve workplace goals. The protection does not extend to all collective activity; rather, it protects against “substantial interference” with collective bargaining rights.

According to the Court, if a government action substantially interferes with the constitutionally-protected right to engage in collective bargaining, then it will have violated the Charter. The Court defined substantial interference as an action which by intent or effect seriously undercuts or undermines collective bargaining. To determine whether a government action has substantially interfered with the right to collectively bargain, the Court enunciated a two-step test.

1. Is the matter important to the process of collective bargaining?

The essential question at this stage 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. The Court suggested that laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer, or laws that unilaterally nullify significant negotiated terms in existing collective agreements are the kinds of matters that would amount to substantial interference with collective bargaining. In contrast, the Court suggested that trivial working conditions, such as the design of uniforms, the layout of cafeterias, and the location of parking lots, were less likely to be viewed as matters important to the process of collective bargaining, and as such, were less likely to give rise to a finding that there was significant interference with the collective bargaining process.

2. Does the government action respect the collective right to good faith negotiation and consultation?

With respect to the second step, the Court held that it was necessary to consider whether the government action respected the “fundamental precept of collective bargaining – the duty to consult and negotiate in good faith”. The duty to bargain in good faith obliges the parties to meet and discuss proposals, to engage in meaningful dialogue, and to be willing to make a reasonable effort to arrive at an acceptable contract. The duty to bargain in good faith does not impose an obligation on the parties to conclude a collective agreement, to accept any particular contractual provisions, or to avoid hard bargaining. However, a finding that one party engaged in “surface bargaining” would most likely constitute a breach of the duty to bargain in good faith. Finally, the Court noted that there may be situations of exigency and urgency that affect the content of the duty to bargain in good faith, and that failure to comply with the duty to consult and bargain in good faith should not be lightly found.

The Court emphasized that both of these inquiries are necessary, stating that if the matters affected do not substantially interfere with the process of collective bargaining, the measure does not violate the Charter. In contrast, if the matters affected substantially interfere with collective bargaining, they may not violate the Charter if a process of consultation and good faith negotiation is preserved. According to the Court, the question in every case is fact specific, and focuses on whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

Application to the impugned Legislation

In 2002, the government of British Columbia enacted the Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2 (variously the “Act” or the “legislation”) that nullified certain collective agreement provisions applicable to employees in the health care sector. Specifically, the legislation purported to reduce costs and facilitate the efficient management of the workforce in the health care sector, which was facing a “crisis of sustainability”. The Act invalidated provisions of collective agreements already in force, and effectively precluded bargaining on a number of specific issues involving transfer and reassignment of employees, contracting out, layoffs, and bumping rights. Neither employers nor employees could contract out of the Act or rely on any collective agreement provisions that were inconsistent with the new legislation.

The Court found that all of the impugned provisions interfered with existing collective agreement rights and future collective bargaining. While the transfer and reassignment provisions made minor modifications and left protections for employees intact, the provisions with respect to contracting out, layoff, and bumping rights substantially interfered with matters that were central to the freedom of association: job security and seniority. Of significant concern to the majority of the Supreme Court was the fact that there was no meaningful consultation or discussion with any of the unions before the legislation was passed.

The Court held that those sections of the legislation that infringed the constitutionally-protected rights of employees were not justified under s. 1 of the Charter, and was therefore invalid.

However, the Court suspended the declaration of invalidity for a period of twelve (12) months to permit the government to address the repercussions of the decision.

The Implications of the Decision

While the impact is unclear, the decision will undoubtedly impact governments and administrative tribunals that are responsible for regulating the collective bargaining regime. Its impact will also be felt in the public sector, where employers are subject to Charter scrutiny. Issues may arise in the context of back-to-work legislation and the right to strike. Moreover, the impact potentially extends to those employees precluded from collective bargaining, or constrained in their choice of bargaining agent or collective bargaining regime, by virtue of existing legislation. Finally, the fact that the Court appears willing to review and reject its own well-settled jurisprudence may give rise to challenges in other areas of the law.

What is clear is that the decision opens the door to more judicial involvement in collective bargaining regimes, including more stringent review of process and of legislation. The decision will undoubtedly contribute to uncertainty which will give rise to future litigation.

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