FREEDOM BARGAIN ORGANIZE

- FREEDOM OF ASSOCIATION
- THE RIGHT TO BARGAIN COLLECTIVELY
  and
- THE RIGHT TO ORGANIZE

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CANADIAN FOUNDATION FOR LABOUR RIGHTS

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Introduction

IN THIS PAPER we discuss the scope of section 2(d) of the *Canadian Charter of Rights and Freedoms* in the labour context, with a particular focus on the right to organize and bargain collectively in the jurisprudence of the Supreme Court of Canada.[1]

At the outset we briefly review the evolution of s. 2(d) jurisprudence from the formative years of the *Charter* to today. The scope of s. 2(d) protection of workers' rights in Canada has developed in a somewhat ad hoc manner. In the early days, the courts gave s. 2(d) a narrow and legalistic interpretation which focussed on the individual. As such, trade unions and workers in Canada received little benefit from s. 2(d) of the *Charter.* Unfortunately, the *Charter* provision was given a more robust interpretation by courts when it was used against unions in the context of a freedom not to associate.[2] However, as time went on, the Supreme Court recognized that s. 2(d) has a collective dimension under which group rights and interests are protected. The high water mark was in 2007 when the Supreme Court, in *B.C. Health Services*[3]*,* departed from its earlier jurisprudence and held that s. 2(d) protects a limited procedural right to collective bargaining. In 2011, the Court decided the Fraser[4] case in the face of a concerted attack on *B.C. Health Services* by governments and intervening business interest groups. In a contentious debate between the justices on the legitimacy of *B.C. Health Services,* the majority of the Court upheld its earlier decision but "clarified" the reach of s. 2(d) in the labour context. This so-called clarification has led to a number of lower court decisions which have resulted in a great deal of uncertainty in the law. It is clear that at its next opportunity the Supreme Court of Canada must decide how fundamental freedom of association is to workers in Canada.

The Early Years

IN THE FORMATIVE years of the *Charter,* the labour movement approached *Charter* litigation in a manner which was neither very coordinated nor methodical. Early on, unions used the *Charter* to challenge laws which curtailed or restricted their activities. In the 1980s, unions challenged wage restraint on the basis that it violated s. 2(d) by restricting workers' rights to collective bargaining. During the same period, unions also challenged laws which restricted the right to strike such as essential services or back to work legislation.

These challenges were consolidated before the Supreme Court of Canada in the "labour trilogy" in 1987. Just five years after the enactment of the *Charter*, the Supreme Court was faced with *Charter* claims engaging fundamental aspects of collective bargaining laws. The litigation strategy raising these fundamental questions so early in the application of the *Charter* was questionable. Certainly other progressive groups were more methodical in selecting which cases should be litigated in the early stages of the *Charter* and adopted an incremental approach.

The Dickson/McIntyre Divide

THE LABOUR TRILOGY set the stage for a vigorous debate on the nature and scope of freedom of association in Canada.[5] The trilogy concerned questions of whether s. 2(d) protects the right to bargain collectively and the right to strike. The focus of the debate between Chief Justice Dickson and Justice McIntyre was whether freedom of association was solely an individual right or whether it also had a collective dimension. While they both agreed that "freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes" they quickly parted company on the scope of the protection afforded by s. 2(d) of the *Charter.*

For the majority, Justice McIntyre took a narrow view of the freedom. His view was based on the Western liberal conception of rights

which places primacy on the individual, emphasizing individual liberty and autonomy. Relying on American constitutional jurisprudence, Justice McIntyre asserted that freedom of association was an explicitly individual right, even though it may advance many group interests. Although the right cannot be exercised alone, the group or collective is "simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations".

Relying on American doctrine, Justice McIntyre defined the scope of s. 2(d)'s protection narrowly so as to include only the following three elements:

- The freedom to join with others in lawful, common pursuits and to establish and maintain organizations and associations;
- The freedom to engage collectively in those activities which are constitutionally protected for each individual; and
- The freedom to pursue with others whatever action an individual can lawfully pursue as an individual.

The labour relations significance of such a narrow conception of freedom of association is that fundamental collective activities such as collective bargaining and striking are not constitutionally protected. In Justice McIntyre's view, such an approach was prudent as such activities should be regulated by the legislatures and not the courts, the latter of which have no labour relations expertise and are not politically accountable.

In contrast, in dissent, Chief Justice Dickson gave a generous and purposive view of freedom of association. His contextual analysis was grounded in Canadian values and democratic traditions. He distinguished American doctrine on the basis of the much different structure of the Canadian *Charter*, which provides for an explicit freedom of association in s. 2(d) and for a balance of the protection of fundamental freedoms with the larger societal interests in section 1. He rejected the American Bill of Rights' narrow delineation of freedom of association under which the right entailed little more than a freedom to belong to and form an association, and engage in the collective exercise of other fundamental freedoms which are constitutionally protected. Unlike the majority, he was not prepared to accept such a "legalistic, ungenerous, indeed vapid" freedom.

In Chief Justice Dickson's view, s. 2(d) must be interpreted to give "effective protection to the interests to which the constitutional guarantee is directed". Freedom of association recognizes the profoundly social nature of human endeavours under which acting with others is

a primary condition of community life, human progress and civilized society. Moreover, the Chief Justice's contextual analysis took into account the unequal distribution of power within society. He noted that historically freedom of association has "enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict".

Finally, Chief Justice Dickson recognized that confining freedom of association to acts which can lawfully be performed by the individual is far too restrictive. The freedom has a collective dimension for which there is no analogy in individual action. In the labour context, his generous interpretation of s. 2(d) led him to conclude that the right to bargain collectively and the right to strike are constitutionally protected. In his view, these rights or freedoms advanced fundamental values underlying the *Charter*, such as human dignity, equality and democracy. It should also be noted that in reaching the conclusion that these essential union activities were protected by s. 2(d), Chief Justice Dickson relied on international human rights law.

Unfortunately, Justice McIntyre's individualistic conception of freedom of association carried in the labour trilogy and was the law for the next two decades. From a labour relations perspective, s. 2(d) only protected the right to form, join and maintain a trade union. Its essential activities such as collective bargaining and striking were not constitutionally protected. However, Chief Justice Dickson's powerful dissent was revived in subsequent decisions and became the underlying analysis of s. 2(d) jurisprudence twenty years later.

A Collective Breakthrough

THE DICKSON/MCINTYRE divide continued to be the backdrop to s. 2(d) challenges in the labour context. Indeed, it continues to this day as we will see below.

Until 2001, the legalistic and individualistic view of freedom of association controlled the judicial analysis. However, in *Dunmore,* a case concerning the exclusion of farm workers from collective bargaining laws, the Supreme Court of Canada took a new direction.[6] First, the Court overcame a tenuous distinction drawn between rights

and freedoms under the *Charter*. According to this doctrine, the fundamental freedoms under s. 2 of the *Charter* guarantee freedom from state interference with a protected activity, but do not go so far as to impose a positive obligation on government to facilitate that activity. However, in *Dunmore*, the Court found that in certain limited circumstances s. 2(d) of the *Charter* may require the state to take affirmative action to facilitate a meaningful freedom of association. In this instance it required the government to extend protective legislation to vulnerable farm workers in order to enable the exercise of their associational freedom.

Second, the court broadened the scope of s. 2(d) protection to include associational activities with no individual analogue. The court concluded that the collective is qualitatively distinct from the individual and as such the collective performs acts which could not be performed by an individual. For example, the making of collective representations to an employer is inconceivable on the individual level. Although the Court in *Dunmore* recognized that s. 2(d) has a collective dimension, it maintained the prevailing law from the labour trilogy that s. 2(d) does not protect the right to bargain collectively.

A significant breakthrough came in 2007 in *B.C. Health Services.* In this case, provincial legislation invalidated provisions of existing collective agreements and prohibited collective bargaining on a number of significant issues in the future. The legislation was enacted without consulting the affected unions or their members. This unilateral and arbitrary state action pushed the Supreme Court to review its jurisprudence emanating from the labour trilogy. In a stunning acknowledgement, the court declared that "the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter's* protection of freedom of association do not withstand principled scrutiny and should be rejected". The decontextualized approach which focussed on the individual ignored Canadian labour relations history, international law and fundamental values underlying the *Charter* such as equality, human dignity and democracy. The Court concluded that "historically, [collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context". In short, Chief Justice Dickson's dissent came back to full life in *B.C. Health Services.*

Ultimately, the Court provided for a limited procedural right to bargain collectively under s. 2(d). It guarantees neither a particular substantive outcome nor access to a particular model of labour

relations or bargaining method. Rather, it protects the ability of workers to engage in associational activities, and their capacity to act in common to achieve goals related to workplace issues and terms and conditions of employment. Where a government measure substantially interferes with the collective bargaining process insofar as it affects a matter important to the bargaining process, and it does so in a way that undermines the duty of good faith negotiation, the government will have infringed s. 2(d) of the *Charter*.

Attempted Revival of the Debate – *Fraser*

IN 2011, IN *FRASER,* the Supreme Court returned to the same debate which had gripped the Court in the labour trilogy. Like *Dunmore,* the case concerned the exclusion of farm workers from collective bargaining laws. In response to *Dunmore,* the legislature of Ontario passed a separate law, the *Agricultural Employees Protection Act* (AEPA), which provided to farm workers rights far inferior to those provided under the *Labour Relations Act*. Since the law did not provide the right to bargain collectively, the workers challenged the law on the basis of the decision in *B.C. Health Services*. In an extraordinarily divided court, the majority of the Court was put on the defensive by an attack on *B.C. Health Services* by Justice Rothstein. He disagreed with the majority ruling that s. 2(d) protects the right to bargain collectively. In an attempt to overrule *B.C. Health Services*, Justice Rothstein attempted to revive the Dickson/McIntyre debate. In his view, s. 2(d) protects individual interests and does not constitutionalize such collective activities as collective bargaining or the other collective rights granted by the U.S. 'Wagner' model of labour legislation.

In response to Justice Rothstein's attack, the majority judgment, authored by Chief Justice McLachlin and Justice LeBel, who co-authored *B.C. Health Services,* stated clearly that the Court was upholding *B.C. Health Services*. However, the majority framed the ultimate issue in narrow terms: whether the impugned law or state action has the effect of making it *impossible* to act collectively to achieve workplace goals. Applying this standard, the court determined that it was pre-

mature to conclude that the impugned legislation offered insufficient protections for s. 2(d) rights. It did so despite clear evidence that the agricultural workers have thus far been unable to meaningfully exercise their collective bargaining rights under the impugned legislation. Moreover, as of today, not one agricultural business in Ontario has become subject to any good faith collective bargaining, let alone a collective agreement under the AEPA – a startling outcome for purported "collective bargaining" legislation.

In the end what we are left with is a re-emergence of the Dickson/McIntyre divide and, in response, a possible retreat from the generous, contextual and purposive analysis of freedom of association put forward by Chief Justice Dickson in the labour trilogy and adopted by the Court in *B.C. Health Services.* As it stands, s. 2(d) in the labour relations context currently guarantees a meaningful process of engagement that permits employee associations to make representations to employers which employers must consider and discuss in good faith. Whether Justice McIntyre's narrow conception of freedom of association will gain currency with future members of the court is difficult to predict. However, as it stands today, we should rely upon the majority's clear statement in *Fraser* that it was upholding the decision in *B.C. Health Services* which held that s. 2(d) protects a right to a process of collective bargaining.

Post *Fraser*

In the aftermath of *Fraser*, there have been a number of s. 2(d) cases in the labour context. In the limited space we have, we focus on two 2012 decisions of the Ontario Court of Appeal which deal with the scope of the protection of the right to bargain collectively under s. 2(d) of the *Charter*.

In *Mounted Police Association of Ontario et al.*, three independent associations of RCMP members challenged the RCMP "labour relations" scheme under s. 2(d) of the *Charter*.[7] The RCMP are expressly excluded from the application of the federal public sector collective bargaining law. Instead, there is a separate employee relations scheme established by federal regulations which is intended "to provide for representation of the interests of all members with respect to staff relations matters".

The internal mechanism, called the Staff Relations Representative Program (SRRP), is a body recognized by the RCMP to present proposals and to be consulted by the RCMP on human resources initiatives in a meaningful and timely manner. Final decision making authority rests with management. As to pay and benefits, the Treasury Board has ultimate authority after reviewing submissions from the RCMP Pay Council, which is made up of two employees, two management representatives and an impartial chair which solicits the views and input from the membership of the RCMP.

Two key questions were raised by the associations' *Charter* challenges. The first related to the refusal of the RCMP to recognize the three associations. This raised the issue of whether the right to collective bargaining under s. 2(d) guarantees workers the right to be represented by an association of their own choosing. The second question was whether the right to collective bargaining under s. 2(d) requires that the workers' representative association be structurally independent of management.

In a conservative and legalistic decision, the Ontario Court of Appeal dismissed the constitutional challenges. In doing so, the court gave *Fraser* a very restrictive interpretation. The court seized upon the statement in *Fraser* which suggested that, in order to establish a breach of s. 2(d) of the *Charter*, the threshold of state action must make it impossible to act collectively or achieve collective goals.

The court also relied on the Supreme Court's holding that s. 2(d) protects the right to collective bargaining in a "derivative sense". From this, the Court of Appeal concluded that the Supreme Court intended that "a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible to achieve workplace goals".

In applying this analysis to the RCMP, the Court of Appeal found that there was no violation of s. 2(d) for a number of reasons. First, unlike the plight of farm workers in *Dunmore*, RCMP members have been able to form voluntary associations as evidenced by the three applicants before the court. Second, there was a mechanism in place, the SRRP, whereby RCMP members could act collectively to achieve workplace goals. Although the RCMP regime lacks the attributes of the Wagner Model, the Supreme Court was clear in *B.C. Health Services* and *Fraser* that it was not constitutionalizing the Wagner Model. Finally, the court relied upon the existence of an independent legal fund which could finance legal representation to RCMP members

in employment and other matters. The court concluded that these three factors indicated that the applicants could not claim the derivative right to collective bargaining was breached because they had not established that it was effectively impossible to achieve collective workplace goals.

In *Association of Justice Counsel*, the Court of Appeal again gave a conservative and legalistic reading of *Fraser*.[8] This case related to a challenge by federal government lawyers to the *Expenditure Restraint Act*, which limited wage increases for a four year restraint period. The Association of Justice Counsel argued that the wage restraint law violated s. 2(d) by rendering collective bargaining on salary "useless" for the restraint period of the legislation.

The Court of Appeal applied what it called the "effectively impossible" test and ruled that "the substantive content of s. 2(d) must be the same whether raised as a sword to claim the right to an effective legislative regime to protect freedom of association or used as a shield to defend against legislation that impinges upon existing statutory protections". Examples of the sword (positive rights) would be the *RCMP* case and *Fraser*. Examples of the shield (negative rights) would be this case and *B.C. Health Services*. Despite the Supreme Court's rejection of the positive-negative rights distinction in *Dunmore* and *Fraser*, it lives on in the lower courts and in the dissent of Justice Rothstein in *Fraser*. This positivist doctrine is clearly not quite dead yet.

On the facts before the court, the union and employer had engaged in a lengthy process of collective bargaining over a two year period prior to the introduction of legislated wage controls. The court reiterated that *Fraser* held that s. 2(d) guarantees a process, not a result. Although the federal government took a tough position in bargaining, the union failed to establish that it was denied the opportunity to present the wage demands of its members, or that the federal government failed to consider these demands in good faith. Section 2(d) does not require that the process of collective bargaining yield a collective agreement. Moreover, the fact that the union had referred the issue of wages to arbitration which became pre-determined by the enactment of the wage restraint law did not amount to a breach of s. 2(d) because *Fraser* held that s. 2(d) does not guarantee a dispute settlement mechanism for a bargaining impasse. The court concluded by stating that "the validity of the [law] must be assessed on the basis of whether, at the time it was enacted, the parties had the opportunity for a meaningful process of collective bargaining".

Conclusion

IN SUMMARY, the legal landscape of s. 2(d) in the labour context after *Fraser* is unclear and fraught with legal uncertainty. Although *Fraser* "clarified" the reach of *B.C. Health Services*, it would appear that the Ontario Court of Appeal, particularly in *Mounted Police Association of Ontario et al.,* is retrenching the reach of s. 2(d) to the pre-*B.C. Health Services* era.

It could be argued that an "effective impossibility" test or a derivative right analysis brings us back to the days when s. 2(d) only protected the right to form, join and maintain a trade union. As Chief Justice Dickson said in the labour trilogy, such an interpretation renders freedom of association as a "legalistic, ungenerous, indeed vapid" freedom. Upon its next opportunity, the Supreme Court of Canada must render an interpretation which ensures that freedom of association is meaningful in the workplace. After all, the *Charter* explicitly recognizes that this freedom is fundamental in Canadian society. As it stands today, of all of the fundamental freedoms found in section 2 of the *Charter*, only freedom of association is qualified by such restrictive thresholds as "substantial interference" or "effective impossibility". Under the *Charter,* such qualifications or restrictions on a fundamental freedom are to be considered and balanced at the section 1 stage of justification. All of the freedoms guaranteed under section 2 of the *Charter* are fundamental. It is not for the courts to prioritize certain freedoms over others.

Endnotes

1 For a more in-depth discussion of this subject matter, see our book chapter, titled "Freedom of Association: How Fundamental is the Freedom? – Section 2(d)" in The Charter at Thirty, R. Gilliland, ed. (Canada Law Book: Toronto, 2012).

2 See, for example, Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211.

3 Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27.

4 Ontario (Attorney General) v. Fraser, 2011 SCC 20.

5 Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; and RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460.

6 Dunmore v. Ontario (Attorney General), 2001 SCC 94.

7 Mounted Police Association of Ontario et al. v. Attorney General (Canada), 2012 ONCA 363.

8 Association of Justice Counsel v. Attorney General (Canada), 2012 ONCA 530.