Constitutional right to strike: Supreme Court reshapes labour law (again)

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Introduction

In its January 2015 decision in Saskatchewan Federation of Labour the Supreme Court held, for the first time, that Canadian workers have a constitutional right to strike. In reaching this conclusion, the Supreme Court overturned almost 30 years of case law that had expressly established that the guarantee of freedom of association in Section 2(d) of the Charter of Rights and Freedoms does not protect strike activity.

Notably, Saskatchewan Federation of Labour came on the heels of two other landmark decisions on Section 2(d) of the charter (for further details please see “Supreme Court update: a new era for labour rights or the same old story?”). Together these decisions raise questions about basic aspects of Canada’s labour relations system and could reshape Canadian workers’ rights to organise, bargain collectively and take strike action.

Mounted Police Association of Ontario – right to organise/bargain collectively

The first decision released by the Supreme Court was Mounted Police Association of Ontario, which arose from a charter challenge initiated by several associations of members of the Royal Canadian Mounted Police (RCMP). The challenge targeted the RCMP’s existing labour relations system, the Staff Relations Representative Programme (SRRP). Under this scheme, RCMP members may not engage in traditional collective bargaining with RCMP management; instead, they are represented by the SRRP, which provides for elected representatives to engage and consult with management on workplace issues.

In Mounted Police Association of Ontario a six-to-one majority of the Supreme Court found that the SRRP scheme violated RCMP members’ right to freedom of association under Section 2(d) of the charter.

In reaching this conclusion, the majority appears to have watered down the strict test that Fraser v Ontario (Attorney General) had established for violations of Section 2(d) in the labour context. In particular, the majority found that an applicant must establish only that government action in the labour context “substantially interferes” with workers’ ability to engage in meaningful association, not that it renders such association “effectively impossible” (the standard established in Fraser).

In addition, after clarifying its ruling in Fraser in this way, the majority went on to find that the “essential features” of a charter-compliant labour system are employee choice and independence from management. However, the majority then emphasised that Section 2(d) does not require a particular form of labour relations, including the adversarial Wagner model that applies to most Canadian workplaces.

Justice Rothstein dissented, strongly disagreeing with the majority’s conclusions and finding, like the unanimous Ontario Court of Appeal below, that the SRRP met the standard set in Fraser. He also argued that the majority’s new approach to Section 2(d) effectively “constitutionalizes” the adversarial Wagner model of collective bargaining, and thereby prevents governments from introducing alternative labour frameworks such as the SRRP. In his view, this is precisely what the court had cautioned against in Fraser.

Meredith – right to bargain collectively

The dispute at issue in Meredith v Canada (which was released on the same day as Mounted Police Association of Ontario) also arose from a conflict between members of the RCMP and the federal government. Specifically, Meredith considered whether the Expenditure Restraint Act violated RCMP
A six-to-one majority of the Supreme Court concluded that the Expenditure Restraint Act did not violate Section 2(d) of the Charter. In reaching this conclusion, five judges adopted the approach to Section 2(d) advanced in *Mounted Police Association of Ontario* (Rothstein concurred, although he applied the test from *Fraser*, Justice Abella dissented). As a result, the majority's analysis is quite brief and the central parts of its decision are set out in a few short paragraphs. In short, the majority concluded that no violation of Section 2(d) occurred because, on the facts, a process of consultation between RCMP members and management regarding compensation continued after the enactment of the Expenditure Restraint Act. Notably, the majority's conclusion on this point appears to have been motivated by the fact that this consultation process ultimately resulted in some increases to RCMP members’ compensation.

**Saskatchewan Federation of Labour – right to strike**

The decision in *Saskatchewan Federation of Labour* was released just two weeks after *Mounted Police Association of Ontario* and *Meredith*. It addressed Saskatchewan’s Public Service Essential Services Act, which establishes an “essential services” system through which public sector employers in Saskatchewan can “designate” certain employees, thereby prohibiting them from going on strike.

A five-to-two majority of the Supreme Court determined that the Public Service Essential Services Act violates Section 2(d). In its reasons, the majority expressly concluded, for the first time, that the guarantee of freedom of association in Section 2(d) applies to strike activity.

The majority stated that it reached this decision on the basis of several factors, including its view of the history of strike activity in Canada, and recent legal developments at the international level and in foreign jurisdictions. However, it is also clear that the majority’s decision was motivated by its view that collective bargaining cannot be “meaningful” unless workers have the ability to withdraw their labour.

Relying on its decisions in *BC Health Services* and *Mounted Police Association of Ontario*, the majority then went on to state that the test for a breach of Section 2(d) in this context examines whether “the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining”.

The majority did not provide a detailed explanation of this test, but did suggest that its main objective is to determine whether the government action at issue upsets the balance of power between workers and the employer in the context of a collective bargaining dispute.

In a single sentence, the majority purported to apply this test to the Public Service Essential Services Act and found that the legislation violates Section 2(d) of the Charter because it prevents designated employees from engaging in any work stoppage during the bargaining process.

The majority also concluded that the legislation could not be saved under Section 1 because it does not minimally impair affected workers’ right to freedom of association. The majority reached this conclusion for three main reasons:

- The legislation allows employers to determine unilaterally whether and how essential services are to be maintained during a work stoppage and there is no “adequate review mechanism” through which determinations can be challenged;
- The legislation requires designated employees to perform all of their duties during a work stoppage, not just those duties that are essential; and
- The legislation does not include a “meaningful dispute resolution mechanism” (eg, interest arbitration) for bargaining disputes.

**Comment**

In an emphatic dissent, Justices Wagner and Rothstein rejected the Saskatchewan Federation of Labour majority’s reasoning and findings. In particular, they argued that the majority’s broad statements and conclusions introduced “great uncertainty” into Canadian labour relations, and rendered all statutory limits on the right to strike “presumptively unconstitutional”. This suggestion is concerning, given that strikes are heavily regulated and restricted at present. Public and private sector employers could face a wave of costly and time-consuming litigation as unions and worker advocates test the limits of the newly recognised (and uncertain) right to strike.

However, the potential success of such litigation is impossible to predict, given the inconsistency of the Supreme Court in this area of law. The Court’s recent approach to labour rights under Section 2(d) of the Charter demonstrates a notable disregard for prior decisions and coherent principles. Given this, and in light of the changing composition of the Court (only four members of the majority in *Saskatchewan Federation of Labour* remain on the Court at present), a future Section 2(d) case raising collective bargaining and/or strike issues could well see the court change direction yet again.

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