
TALKING UNION IS A NEWSLETTER HIGHLIGHTING MATTERS OF
INTEREST TO THE LABOUR RELATIONS COMMUNITY

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Supreme Court rules that collective bargaining is protected by Constitution

The right to collective bargaining in the workplace is protected by the *Charter of Rights and Freedoms* (the "Charter"), the Supreme Court of Canada ruled last month in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* (the "Health Services" case). In a stunning decision, the Court expressly repudiated its previous rulings on the subject. The Court wrote:

"In earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining....We conclude 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."

(i) Bill 29 – The challenged statute

The *Health Services* case concerned a challenge to the *Health and Social Services Delivery Improvement Act* ("Bill 29"), which was introduced by the Government of British Columbia in 2002. This legislation shredded legally negotiated collective agreement job security provisions that, amongst other things, protected employees against contracting out. Bill 29 paved the way for an unprecedented privatization of health care services and the mass firing of more than 8,000 health care workers.

The legislation was passed very quickly and came into force only three days after it was first introduced in the Legislature. The Court accepted that there was "no meaningful consultation" with the unions before the legislation was passed. It noted that the Government's only contact with the affected unions before the legislation was passed was a telephone call from the Minister of Health to a union representative, approximately 20 minutes before the introduction of the legislation, advising that the Government was about to introduce legislation dealing with employment security and other provisions of the collective agreements. This lack of consultation with the affected unions was an important factor underlying the Court's decision to strike down several provisions of the Act on the basis that those provisions collided with the *Charter*.

(ii) What the *Charter* protects

The Court engaged in a thorough review of its jurisprudence regarding the freedom of association guaranteed by the *Charter*. In the end, the Court concluded that its previous holdings in the so-called “labour trilogy” and thereafter “could not stand.” The Court then sought to describe the scope and content of the *Charter*’s newly-proclaimed protection of collective bargaining.

The Court announced that the *Charter* protects the *process* of collective bargaining, but does not guarantee any particular outcome that may be sought through bargaining. Moreover, the *Charter* right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method.

Under the *Charter*, employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. The *Charter* imposes corresponding duties on government employers to agree to meet and to discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining. However, the *Charter* does not protect all aspects of collective bargaining. And it protects only against “substantial interference” with the ability of a trade union to exert meaningful influence over working conditions through a process of collective bargaining *conducted in accordance with the duty to bargain in good faith*. The *Charter* “requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.”

To constitute “substantial interference” with freedom of association, the intent or effect must seriously undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer (i.e. the process known as collective bargaining). Determining whether a government measure amounts to “substantial interference” involves two inquiries: (1) determining the importance of the affected matter to the process of collective bargaining, and (2) assessing the manner in which the measure impacts on the collective right to good faith negotiation and consultation. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate the *Charter* and the employer may be under no duty to discuss and consult. The more important the matter, the more likely that there will be a finding of “substantial interference” with the *Charter* right. The Court gave examples:

“Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association.”

As noted, even where the matter is important, there may not be a *Charter* breach if a process of consultation and good faith negotiation is preserved. **It is only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation that a *Charter* breach will be found.**

(iii) The reach of the Court's decision

The Court's decision represents an important victory for organized labour. As critics, such as Prof. Judy Fudge have observed, the Court's longstanding refusal to interpret the *Charter's* freedom of association guarantee had been taken as a clear signal by governments across Canada that they could ride roughshod over workers' hard-fought-for rights. After the Court's decision in this case, at a minimum, governments will have to consider workers' rights and to consult with their unions before introducing draconian legislation.

At the same time there will inevitably be issues in the future as to whether the denial of a supportive statutory collective bargaining regime to certain defined groups (such as self-employed artists, agricultural workers, RCMP employees, part-time community college workers and others) violates the *Charter* – even if the *Charter* does not protect any particular model of collective bargaining.

The Court's decision may also have an important impact on construction industry labour relations in Ontario. For example, the “non-construction employer” provisions of the *Labour Relations Act* – which allow employers to unilaterally terminate construction industry bargaining rights without regard to employee wishes – may now be seen to offend the *Charter*. And the so-called “deemed abandonment” of construction industry bargaining rights outside of Board Area 8, which was accomplished after the enactment of Bill 69 by a simple order of Cabinet (and, again, without regard to employee wishes) may also be ripe for challenge.

Finally, it is an open question as to whether the protected aspect of collective bargaining can be limited to the duty to bargain in good faith as implied by the Court's decision. By grounding its decision in international law, including the International Labour Organization's *Convention (No. 87) Concerning Freedom of Association*, the Court has now opened the door to the question of whether freedom of association also includes the right to strike. The link between the right to strike and meaningful collective bargaining is manifest. Indeed, it is already explicitly recognized in Ontario law (see, for example, section 42 of the *Crown Employees Collective Bargaining Act*). But how and when this issue will reach the Court – and what the outcome will be – cannot be predicted at this time.

Labour Relations Board orders remedial certification for first time under Bill 144

In its first decision dealing with Bill 144's remedial certification provisions, the Ontario Labour Relations Board has embraced its restored jurisdiction under section 11 of the *Labour Relations Act*. In the *Swing Stage Equipment Rentals* case released on June 15, 2007, the Board granted automatic certification to the Carpenters' union, notwithstanding its inability to sign up even 40% of the bargaining unit. The Board accepted that the discharge of an inside organizer, who had been employed for only 9 days, was designed by the employer to end the union's organizing campaign. Indeed, that end was accomplished. Accordingly, the Board determined that certifying the union was the only remedy sufficient to address the employer's breach of the *Labour Relations Act*.

In coming to this conclusion, the Board applied and adopted the long settled jurisprudence that was in place prior to the Tories' so-called *Wal-Mart Bill*. The Board noted that under its established caselaw, the Board will generally award automatic certification when the employer's contravention involves threats to job security or actual discharges linked to support for the union. That is because such actions “poison the well.” And once the well is poisoned in this manner, it becomes impossible to

ascertain the true wishes of the employees. Accordingly, the Board rejected the utility of ordering a vote as a remedy for the employer's misconduct. The Board wrote:

"In this case, the employees cannot freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity. The actions of the employer served two purposes. It stopped the union organizer from having access to employees and it sent a message to employees that support for the union meant job loss. A representation vote with ancillary relief will not be sufficient to counter the effect of the employer's contravention. There is no certainty for employees entering the polls that the employer will not do to them what it did to Mr. McCarthy. There is nothing the Board can do as remedy that could make the employees believe that their job security is not tied to their support for the union. The Board cannot fashion a remedy that will reverse the effect on employees of that job threat. Accordingly, the remedy of certification is the only one sufficient to address the breach in this case."

The power to grant automatic certification in response to serious unfair labour practices has long been considered essential. Apart from its remedial purpose, the power to certify automatically in these circumstances has a prophylactic effect. It is meant to restrain the impulse to commit unfair labour practices during organizing campaigns, because such conduct might itself produce the very outcome that the employer seeks to avoid: certification of the trade union. It is important, therefore, that the Board in this case has signalled its intention to use its new powers, without hesitation, when employers unlawfully threaten employees' job security in the context of an organizing campaign.

Divisional Court endorses labour board's "consultation" procedure

The "consultation" procedure frequently used by the Ontario Labour Relations Board has been controversial since it was first introduced in 1993. In an important Divisional Court decision released June 22, 2007, the Court rejected arguments that "consultations" are not properly authorized by the Board's *Rules of Procedure* and that the "consultation" procedure denies litigants natural justice. In the *Guild Electric* case, the Court strongly endorsed the use of "consultations" to resolve time-sensitive labour relations disputes, particularly in the construction industry. And the Court emphasized that the Board's decision as to whether the consultation procedure was appropriate in a given case was entitled to "proper deference" having regard to its "specialized perspective".

"Consultation" proceedings are generally thick with paper and rely on oral submissions, but they usually do not involve oral testimony from witnesses or cross-examination. "Consultations" were first adopted by the Board to resolve jurisdictional dispute complaints, but their use has expanded to many other proceedings: duty of fair representation complaints, interim relief cases, essential service disputes under the *Crown Employees Collective Bargaining Act*, successor rights cases under the *Public Sector Labour Relations Transition Act* and, most recently, complaints alleging unlawful interference with the autonomy of local construction unions (commonly referred to as "Bill 80" complaints). "Consultations" – in contrast to full-blown "hearings"— typically take no more than one or two days to complete.

In the *Guild Electric* case, the Labour Relations Board held a two-day consultation in connection with a complaint under Bill 80 that the International Brotherhood of Electrical Workers had improperly – albeit temporarily – altered the jurisdiction of its Local 1739 in Barrie, Ontario. The Board dealt with –

and dismissed – the complaint in an expedited fashion. It held that there was “just cause” for the action taken by International Union and gave brief reasons for that conclusion. On judicial review, the Local raised several procedural and substantive challenges to the Board’s decision, including the finding that there was “just cause” for the alteration in the Local’s jurisdiction. But the primary argument made – and rejected by the Court – was that “the Board may not use the consultation procedure when it results in a decision that flows from untested conflicting facts that raise issues of credibility.”

It is likely that this Court decision will lead the Board to expand the use of “consultations” into new areas, for example, appeals of inspector orders under the *Occupational Health and Safety Act*. Furthermore, it is anticipated that the “consultation” procedure will be adapted by the Human Rights Tribunal of Ontario as one of its available adjudication models after the *Human Rights Code Amendment Act, 2006* (Bill 107) comes into force (expected later this year).

Chief Justice of Canada to deliver Koskie Minsky Lecture in Labour Law

On Friday October 26, 2007, the Right Honourable Chief Justice of Canada, Beverly McLachlin, P.C. will deliver the **5th Annual Koskie Minsky University Lecture in Labour Law** focusing on “*The Charter, Human Rights and Labour Law: 25 Years Later*”, at the Faculty of Law, University of Western Ontario, London, Ontario.

The Koskie Minsky University Lecture is part of a special weekend of labour law scholarship and discussion. On Saturday October 27, 2007, the Faculty of Law and the Heenan Blaikie law firm will sponsor a conference on the same topic to be addressed by Chief Justice McLachlin in her Lecture. We encourage anyone interested in labour law to attend at both the Lecture and the Conference. There is no charge for attendance at the Lecture or the subsequent reception.

Further information with respect to both the Lecture and Conference will soon be available on the Koskie Minsky website: www.kmlaw.ca.

Study reports only slight decline in wage gap between young men and women

The earnings gap between young women and men declined only moderately during the 1990s, despite a dramatic increase in the proportion of young women holding a university degree, according to a new study released by Statistics Canada.

From 1991 to 2001, the proportion of 25- to 29-year-old women holding a university degree went from 21% to 34%. In contrast, the proportion of 25- to 29-year-old men holding a university degree only rose moderately over the period, from 16% in 1991 to 21% in 2001. Despite the sharp increase in the proportion of young women with a university degree and the fact that university degree-holders generally earn more than other workers, the gender earnings gap only declined slightly over the period. Specifically, women aged 25 to 29 earned 20% less than men in 1991. By 2001, the gap had narrowed slightly to 18%. Virtually all of this decline was related to the rising educational attainment of young women.

One reason why the earnings gap only declined slightly in the 1990s, despite the rapidly rising educational attainment among young women, is that the gap among university graduates actually increased over the period. It went from 12% in 1991 to 18% in 2001. This was largely the result of real wage declines in female-dominated disciplines, such as health and education, and real wage increases in male-dominated disciplines, such as engineering, mathematics, computer sciences and physical sciences.

The research paper titled "Has higher education among young women substantially reduced the gender gap in employment and earnings?", is now available from the Analytical Studies module of the Statistics Canada website: www.statcan.ca.