



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

Editors

Elizabeth Mitchell

Telephone:

416-977-8353

Ursula Boylan

TeleFax:

416-977-3316

January 2002

**CHARTER RIGHTS AT THE SCC: TWO DECISIONS PROVIDE GREATER SUBSTANCE**

In two recent decisions, the Supreme Court of Canada has interpreted *Charter* freedoms meaningfully. In *Dunmore et al and UFCW v. Ontario Attorney General and Fleming Chicks*, the SCC struck down Ontario's prohibition on the ability of agricultural workers to form employee associations as offending the freedom of association ("FOA"). In *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada*, the SCC found that secondary picketing is an exercise of the freedom of expression protected by s. 2(b) of the *Charter* and cannot be overridden without evidence of tortious or criminal conduct. Do these decisions indicate that the SCC will now give more substance to *Charter* rights than it has previously? The full answer will become apparent only as more issues affecting trade unions and their members make their way to Canada's highest court.

***Dunmore*: Freedom of Association for Farm Workers**

In 1995, the newly-elected Harris government repealed the *Agricultural Labour Relations Act*, a statute which had given agricultural workers the right to join trade unions for the first time since 1943. Under that statute, in force only since 1994, the UFCW had won bargaining rights for agricultural workers in three business, including a mushroom-growing factory, and Fleming Chicks. The *Labour Relations and Employment Statute Law Amendment* and amendments to the *Labour Relations Act* excluded agricultural workers from the *LRA*, repealed newly-obtained union bargaining rights and invalidated relevant collective agreements. Individual farm workers and union organizers challenged this legislation unsuccessfully in the lower courts. In *Dunmore*, however, the SCC declared the exclusion of agricultural workers invalid but suspended that declaration for 18 months to permit passage of amending legislation.

The majority decision, written by Mr. Justice Bastarache, carefully distinguishes between a right to "form an association" and the right to "collectively bargain". Bastarache J. holds the *Charter* protects only the former, consistently with earlier SCC decisions. However, the SCC does rule that there are some activities which require

collective action, such as expressing a majority view, joining a political party, participating in a class action, or certifying a trade union, and that the *Charter* protects both individual action done with others and rights that can only exist and be exercised by a group.

Traditionally, courts find that the *Charter* only prohibits government action that impedes a right, but does not require positive action. In *Dunmore*, however, the SCC recognized that in the field of labour relations, government restraint is unrealistic: non-intervention leaves employees exposed to unfair labour practices and to civil liability. Therefore, positive action is required. Since governments chose to legislate in the sphere of private employer/employee relations, they must do so in a way which does not interfere with *Charter* rights. At a minimum, the FOA requires statutory protection from employer interference and reprisals. The exclusion of agricultural workers from a statutory regime protecting most other workers makes the *LRA* under-inclusive and substantially interferes with the ss. 2(d) rights of those excluded employees.

The SCC examined the effect of the law. The purpose of the *LRA* is to safeguard the right to organize. By being denied this protection, agricultural workers were rendered incapable of exercising that fundamental right. The agricultural workers, generally, were poorly paid, politically powerless, had low levels of skill and education, low status and limited employment mobility. They were especially in need of legislated protections if their right to FOA was to have meaning. Their exclusion from the *LRA* placed a chilling effect on and discredited organizing efforts among them, an impact the government could have and did foresee when rescinding their right to organize. The SCC stated unequivocally that the FOA necessarily includes a freedom to organize and that trade union rights are “core” rights under the *Charter*.

Having found substantial interference with the *Charter's* FOA, the SCC then asked whether that infringement could be justified in a free and democratic society. The government's stated objectives were to protect the “family farm”, and to protect an industry that was volatile, highly competitive, and had thin profit margins. Although these interests were substantial, the Court also found that the *total* exclusion of agricultural workers from any statutory protections was not rationally connected to the objective and more than minimally impaired the employees' right. The legislation does not recognize that many agricultural businesses are far removed from the “family farm”; many other industries suffer competition and low profit margins. Noting that other provinces have less intrusive legislation, the SCC found that the statutory exclusion could not be justified.

Having declared that the exclusion from organizing must be struck down, the SCC then delayed the application of its order for 18 months to allow Ontario to pass new legislation. It addressed the province's legislators, and noted that, in order to provide freedom of association, such new legislation must provide at least:

- i. that agricultural workers can form and maintain employee associations;

- ii. that the associations must be allowed to operate in a meaningful way, ie, the farm workers must be able to assemble, participate in the lawful activities of their associations, including making representations, and be free from interference, coercion, and discrimination.

While not overruling any of its prior decisions, the SCC in *Dunmore* has given a broader meaning to the FOA than it had previously, has recognized the importance of trade union and group rights as an exercise of that freedom, and has provided a framework for examining the legitimacy of the exclusion of any group from the right to organize. The court has still not gone so far as to recognize a right to join a *trade union* or to *bargain collectively* as rights protected by the *Charter*.

### ***Pepsi-Cola Canada: Off-site picketing can be wrongful action***

In *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada* the SCC struck down the distinction between "primary" and "secondary" picketing and established that picketing, wherever it occurs, should only be restrained where it amounts to "wrongful action". The legal question is whether the picketers' conduct amounts to a tort or to a criminal act. If not, it is protected as an exercise of the picketers' freedom of expression ("FOE") under s. 2(b) of the *Charter*.

Pepsi's employees, during a lawful strike/lockout, picketed a hotel where replacement workers were staying, outside the homes of management personnel, and outside retail outlets. The picketing at the hotel and the stores was peaceful, although it successfully interfered with the delivery of some Pepsi products. At the employee homes, the picketing included screaming insults and uttering threats. Pepsi sought injunctions against this "secondary" picketing. The trial court held that all secondary picketing is illegal and granted the injunctions. The Saskatchewan Court of Appeal prohibited the picketing at the homes, but allowed it at the hotel and the stores. Pepsi appealed.

The SCC noted that secondary picketing pits the employees' FOE against protecting third parties from economic harm. The SCC reviewed the common law approach to secondary picketing, finding it confusing and, insofar as it may be interpreted to prohibit *all* secondary picketing, in violation of the *Charter*. The SCC reiterated its past conclusions (reviewed in TALKING UNION Sept. 1999) that the FOE is one of the most important rights in a free society. Leafleting and picketing are exercises of that right, seeking to persuade the public and discourage dealings with the struck employer. Prohibiting all secondary picketing violates the *Charter*, as limits on protected rights must interfere as little as possible. The very nature and purpose of peaceful picketing may cause some economic harm. The economic rights of third parties do not trump the constitutional right to free expression. However, they should be protected when the economic harm becomes "undue".

The SCC concluded that the *Charter* requires that that all picketing be permitted unless it is wrongful or unjustified, i.e., it involves a civil

or criminal wrong. Wrongful picketing can be controlled by tort and contract law, such as the laws on nuisance, inducing breach of contract, intimidation or trespass, and under the criminal law. This “wrongful action” test balances the competing interests of the FOE and economic rights. The new test negates the distinction between “primary” and “secondary” picketing, treats picketing during labour disputes identically to other exercises of free expression by groups, and provides flexibility and adequate protection. Legislatures can legislate additional controls, if necessary and if consistent with the *Charter*.

Applying this test, the SCC held that the injunction against picketing at the homes of Pepsi’s management was appropriate as the picketing was tortious, intimidating and threatening and Pepsi had standing to seek the injunction on behalf of its employees. The picketing at the hotel and the retail outlets, however, were peaceful and, therefore, lawful. In any event, a complaint about the picketing there would be based on wrongful action toward the third party, actionable only by the third party, not by Pepsi.

This decision is helpful to trade unions. It provides a clear test by which to assess the reasonableness of picketing and leafleting activity, wherever it occurs. It ensures that it is the wronged party, not the stuck employer, who must establish that the picketing has caused a civil or criminal wrong.

## **BEREAVEMENT LEAVE WON IN DEATH OF A GREAT GRANDPARENT**

Following arguments of Koskie Minsky counsel in OLBEU (McColgan) v. LCBO, GSB File #1353/00, the Grievance Settlement Board allowed a grievor bereavement leave for the death of his great-grandmother.

The Vice Chair held that there are three categories of bereavement provisions with distinct principles of interpretation. If the CA provides leave for the deaths of certain named classes of persons (e.g., mother, father, spouse), arbitrators will generally not grant leave upon the death of a person not specifically mentioned. If the CA provides leaves for the death of a member of a group (i.e. “immediate family”) and then defines the group, arbitrators again commonly, but not exclusively, limit entitlement to the expressly named members. However, where a CA provides leave following the death of a member of a group but either does not define the group or provides only an inclusive definition (i.e. “shall include...”), arbitrators will apply a broad interpretation and will be more likely to ‘read in’ additional family members, such as great grandparents. The Board determined that the instant CA was of the third type, and that a great-grandparent was a member of the “immediate family”, even though not specifically listed.

This decision may assist union representatives in determining whether a CA can be interpreted to provide bereavement leave for the death of an individual not specifically listed and in drafting language for bereavement leave provisions which allows for a broad

definition of "family". Should you wish a copy of the decision, please contact the editors.

## WHAT'S NEW?

### AT KOSKIE MINSKY

**New Lawyers:** Our former articling students, **Leanne Hull** (pensions and benefits) and **Alisa Kinkaid** (civil litigation), have now joined KM as lawyers.

They can be reached at 595-2142 and 595-2143, respectively.

**407 Class Action:** Our **Kirk Baert** is one of the lawyers representing the class of persons acting against the owners of Hwy. 407, alleging its administrative fees are so high as to be criminal. New members of the class are welcome. Call (toll free) 1-866-778-7986 for more information.

**At PPI:** Our communications specialist and a KM labour lawyer recently helped a trade union prepare a PowerPoint presentation for the union's use in an organizing campaign. Contact the editors if you want help communicating with current or potential members.

### LEGISLATIVE NEWS

**Decertification Document:** The Ministry of Labour has published its document on how to terminate union bargaining rights for posting in unionized workplaces. The Ontario Federation of Labour has a corresponding poster proclaiming the benefits of collective bargaining. You may want to post the OFL's poster in the same workplaces. Contact the OFL at 416-441-2731, or take the poster off the OFL's website, or contact the editors.

**Consultations on Privacy Legislation:** The government has issued a consultation paper on its proposed *Privacy Act*. Anyone possessing "personal information" about another, including unions, will be covered by the new law. The Government is soliciting input **by March 8, 2002**. The 127 page draft is available at [this link](#), or from the Ministry. **If you want help making submissions, KM and PPI can help.** Contact the editors.

The above review is intended to provide the highlights of the changes made by the new *ESA 2000*, not to outline every change nor provide advice regarding any particular fact situation. Should you require more information about the *ESA 2000* amendments, contact the Ministry of Labour for brochures. The Ministry's web site is [available here](#). Should you have a particular fact situation for which you require legal advice, the labour and employment lawyers at KOSKIE MINSKY would be pleased to assist.