Canadian Labour Congress
Congrès du travail du Canada

Report to the CLC Canadian Council
From James Clancy, Chair
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A. Challenges against labour laws currently before the courts

We are currently tracking 15 *Charter* challenges before the courts. All, except one, have been initiated by unions against regressive labour laws passed in the last five years.

B. Recent Supreme Court decisions

On January 2015, the Supreme Court of Canada released the following three decisions on *Charter* challenges by unions against restrictive labour laws:

1. *Saskatchewan Federation of Labour et al. v. Attorney General of Saskatchewan*

The January 30, 2015 decision by the Supreme Court of Canada (SCC) is one of the most significant cases for the labour movement in the past three decades. The SCC confirmed in a five to two majority decision that the right to strike is a constitutional right for all workers in Canada, regardless of whether they work in the private sector or the public sector.

This case, brought forward by the Saskatchewan Federation of Labour and several of its affiliates involved a *Charter* challenge against two labour laws passed by the Wall government in June 2008: Bill 5, *Public Service Essential Services Act* and Bill 6, *Amendments to the Trade Union Act.* The case, however, had been primarily against Bill 5 which broadened the scope of essential service employees to the point that the legislation effectively took away the right to strike of almost all public sector workers in Saskatchewan.

The SCC ruled that "the conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations" (para. 3) and therefore found the *Public Service Essential Services Act* unconstitutional.

The majority explicitly overturned the 1987 *Alberta Reference* case, and endorsed the progressive and influential dissent in that judgment by then-Chief Justice Dickson. The majority held that the right to strike is an "indispensable component" of collective bargaining and thus freedom of association (see paras. 4 and 75).

Significantly, the Court also found that any legislation which "prevents designated employees from engaging in *any* work stoppage as part of the bargaining process" constitutes a violation of section 2(d) of the Charter and must be justified by the government under section 1 (see para. 78). In other words, whenever a government abrogates the right to strike, there is a presumption that it violates the Charter and the onus shifts to the government to demonstrate that the measure is rational, justifiable, and minimally impairs the right.

The Court also made it clear that restrictions on strikes for workers who perform essential services may be justifiable under section 1, but there must be an "independent review mechanism" to determine whether services are truly essential, and further there needs to be a "meaningful dispute resolution mechanism" to resolve the bargaining impasse for workers who can't strike (para. 81). This means:

- An essential service cannot be unilaterally designated, but, properly interpreted, must be one "the interruption of which would threaten **serious harm** to the general public or to a part of the population" (para. 84, quoting Dickson). In the same paragraph, Dickson quotes the ILO on essential services being those that, if interrupted, "would endanger the life, personal safety or health of the whole or part of the population". See also para. 86.
- Affected employees should only be required to perform essential services, and not non-essential work during strike action. (see para. 91)
- The designation of essential services and the workers who must perform them needs to be subject to "an impartial and effective dispute resolution process" (para. 92). In other words, the labour board must be involved.
- Where the right to strike must be abrogated to protect essential services, some kind of independent arbitration to deal with the bargaining impasse will "almost always" be required. (see paras. 93-95)

The consensus is that this judgment is a landmark win for labour. It is particularly strong for public employees of any stripe – municipal, provincial, or federal – as the Court effectively constitutionalizes the meaning of "essential services" as those services that, if withdrawn, would seriously threaten or endanger public health or safety.

On a final note, the Court strongly supported the arguments on international law (paras. 62-71). Among other things, the Court stressed that certain treaties explicitly protect the right to strike. The Court did not explicitly endorse the rulings of the International Labour Organization (ILO) Committee on Freedom of Association (CFA) however it did point that the CFA decisions are "relevant and persuasive." That said, the Court referred to CFA decisions as "jurisprudence" and found that "it has been the leading interpreter of the contours of the right to strike" (para. 69).

There are three other cases before the Courts concerning similar essential services legislation which will be impacted by this decision:

- the December 2013 federal Bill C-4, *Economic Action Plan 2013 Act*
- the March 2014 Nova Scotia Bill 30, ***Essential Home-support Services Act***
- *the April 2014 N*ova Scotia Bill 37, *Essential Health & Community Services Act*

2. *Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association v. Attorney General of Canada*

The challenge concerned whether section 2. (d) of the *Charter* protects a worker's **right to join a union for the purposes of collective bargaining**. The initiators of the *Charter* challenge were the Mounted Police Association of Ontario and the B.C. Mounted Police Professional Association.

Section 2 (1) (d) of the *Public Service Labour Relations Act* excludes members of the RCMP from engaging in collective bargaining. Section 41 of the *Royal Canadian Mounted Police Act Regulations* prohibits members of the RCMP from publicly criticizing the police force. Section 96 of the *Regulations of the RCMP Act* establishes a separate scheme (different than collective bargaining) to deal with labour relations between RCMP officers and management.

The SCC ruled in favour of the two Mounted Police Associations. The SCC concluded that the *Charter's*:

> "section 2.(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence." (para 5, 2015 SCC1, Case number 34948)

Accordingly, the SCC allowed the appeal and found both Acts infringe on section 2. (d) of the *Charter* and that neither infringement is justified under section 1 of the *Charter.*

The most fundamental implication of the decisions is that s. 2(d) of the Charter provides constitutional protection for a democratic and independent trade union movement, and confirmation that trade unions have the constitutional right on behalf of workers to engage in meaningful collective bargaining. The SFL decision reinforces the right to meaningful bargaining with a constitutionally backed up by the right to strike (or arbitration for essential service workers).

Furthermore, both decisions unequivocally find that freedom of association protects both individual rights and collective rights. This strengthens the claims of trade unions for independent protection from legislative interference under the Charter.

This will strengthen our arguments that Bill C-377 is unconstitutional due to its adverse effect on the functioning of unions. The decision may also carry positive implications for other groups of workers still excluded from collective bargaining legislation, both in the private and public sectors.

3. *Meredith and Roach v. Attorney General of Canada*

The challenge was concerning whether section 2.(d) of the *Charter* protects workers from **substantial interference by governments in collective bargaining**.

The initiators of the Charter challenge were the Canadian Police Association, the Mounted Police Members' Legal Fund and the L'Association des Membres de la Police Montée du Québec.

The challenge was against the *Expenditure Restraint Act* (ERA), as part of the federal government's 2009 *Budget Implementation Act* (Bill C-10), which imposed caps on salary increases for federal government employees, prohibited any additional compensation increases such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation denied previously negotiated collective agreements containing wage increases above the imposed salary caps.

The SCC ruled against the challenge and dismissed the appeal. The SCC concluded that the ERA did not amount to a "substantial interference" in the associational activities of RCMP officers, "despite its constitutional deficiencies."

The SCC noted that the ERA resulted in a rollback of scheduled wage increases for RCMP members and eliminated other anticipated benefits. However, the Court found the process followed to impose the wage restraints did not disregard the substance of the usual procedure, and consultations on other compensation-related issues, either in the past or the future, were not precluded. The SCC concluded "the *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members." (para 30, 2015 SCC 2, Case number 35424)

The difference in this case compared to the SCC June 2007 *Health Services* decision against the BC *Health and Social Services Delivery Improvement Act,* 2002, which the Court found to be unconstitutional was that the SCC noted that the ERA did not have "radical changes to the BC legislation".

> The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2 (*d*). Nonetheless, the comparison between the impugned legislation in that case and the *ERA* is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the

> former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future. (para 28, 2015 SCC 2, Case number 35424)

In other words the Court found in 2007 that the BC *Health and Social Services Delivery Improvement Act* was a substantial interference by government in collective bargaining, while the ERA was not.

There are five other challenges against Bill C-10 before the Courts. These five challenges will mostly likely be impacted by this decision.

C. Merit Contractors challenge trying to establish constitutional right 'not to associate'

We are keeping a close eye on a constitutional challenge by the anti-union Merit Contractors that is slowly making its way through the courts in Manitoba.

The challenge was initiated by the Merit Contractors Association of Manitoba, with a group of five individual contractors, against Manitoba Hydro and its policy of having employees join a union as a prerequisite to be able to work on major hydroelectric projects.

The statement of claim, filed at the Manitoba Court of Queen's Bench back in June 2012, argues that the requirement for joining a union and mandatory dues payments contained in the union security clauses in the collective agreements are contrary to Section 2(d) of the *Charter*. In essence they are arguing that the freedom to associate includes the freedom "not to associate."

The unions involved are the Heat and Frost Insulators, the International Brotherhood of Electrical Workers (IBEW) and the International Union of Operating Engineers (IUOE).

A preliminary hearing for the challenge has yet to be scheduled. The Court has held a number of hearings on contested motions throughout 2013 and in 2014. The three unions have filed a challenge to the jurisdiction of the court to hear the case and that will be heard in February 2015. The case itself will probably not be heard until late 2015.

D. Bill C-377

The Senate voted in June 2013, with the help of 16 Conservative Senators led by Hugh Segal, to send Bill C-377 back to Parliament with a number of amendments. However, it is now back before the Senate unchanged.

Bill C-377 passed second reading in the Senate on November 4, 2014 and the expectation is that, with Hugh Segal retired from the Senate, we won't have enough support from Conservative Senators this time to defeat it for a second time. Currently Bill C-377 is in committee at the Senate

Nevertheless, we think it's important that the CLC keep up its lobby and pressure, especially on those Conservative Senators who voted against Bill C-377 in June 2013.

In the event that Bill C-377 passes, the CLC Legal Challenges Coordinating Committee will be proposing to the CLC Canadian Council a legal strategy for the CLC and its affiliated bodies to follow.

E. New regressive labour laws

For your information, the following two laws were passed in October 2014, and are not at this point, subject to a *Charter* challenge:

1. Nova Scotia Bill 1, *Health Authorities Act*

This Act denies 24,000 health care workers the freedom to choose the union they want to represent them. The legislation limits the number of bargaining units in the health sector to four province-wide units. It states that each of the current four unions in the health care sector—the Nova Scotia Government and General Employees Union (NSGEU), the Nova Scotia Nurses' Union (NSNU), the Canadian Union of Public Employees (CUPE) and UNIFOR—can only represent one the four new bargaining units.

The Act basically defines which units the members will belong to and does not allow run off votes in which members would have an opportunity to vote for the union of their choice.

The Act provided for a restrictive 90 day mediation-arbitration process. Within days of Bill 1 being proclaimed on October 3, the Nova Scotia government accepted the recommendation of the four unions to appoint well-known and respected arbitrator, James Dorsey Q.C., as the mediator-arbitrator to oversee implementation of Bill 1.

A mediation process led by Dorsey began October 17 and ended at an impasse on November 17, without any mediated agreement. On December 4, the process moved to the arbitration stage, with parties making representations to Dorsey for six days during the month of December.

On January 19, 2015, Dorsey released an interim decision. He made no final decision on the structure of health care bargaining units. He did, however, imply that the unions could establish multi-union entities to bargain on behalf of health care employees. This concept is similar to the bargaining association model that the four unions proposed to the government prior to the introduction of Bill 1.

The final determination of the composition of the bargaining units, and of the bargaining agents to represent them, will be subject to further mediation and arbitration that Mr. Dorsey has scheduled for the week of February 2-6, 2015.

2. Québec's Bill 8, *An Act to amend the Labour Code with respect to certain employees of farming business*

This Act effectively denies workers in small agriculture operations the right to unionize and bargain collectively. The legislation singles out agriculture workers in workplaces where there are less than three full-time employees, allowing only for undefined “associations” which merely have the right to “inform” employers of workplace issues.

This law comes on the heels of a 2013 decision by Québec’s Superior Court that found sections of the Québec *Labour Code* allowing for the exclusion of agriculture workers from the right to organize to be unconstitutional. The former PQ government did not appeal the Court's decision. Shortly after the current Liberal government was elected, it circumvented the Superior Court's decision by introducing Bill 8. The Act is modelled after the Ontario *Agricultural Employees’ Protection Act,* which was found not to violate Canada's *Charter* in the controversial Supreme Court of Canada *Fraser* decision released in April 2011.

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