

Collective Bargaining Protected By Charter – SCC Rules

Health Services and Support - Facilities Subsection Bargaining Association v. British Columbia, 2007 SCC 27

In a landmark decision, the Supreme Court of Canada ruled (6-1) that the right of workers to bargain collectively is protected by the *Canadian Charter of Rights and Freedoms*. The decision changes nearly 20 years of the SCC's own jurisprudence and overturns several provisions of the controversial *Health and Social Services Delivery Improvement Act*, adopted by the B.C. Government in 2002 (the "*Act*").

Specifically, the Court declared sections 6(2), 6(4) and 9 the *Act* to be in violation of section 2(d) of the *Charter*, which protects the freedom of association. Sections 6(2) and 6(4) of the *Act* increased the government's power to contract out non-clinical services and prohibited the inclusion in future collective agreements of provisions protecting employees from contracting out. Section 9 dealt with layoffs and bumping and effectively made both past and future collective agreements meaningless on these issues.

The Court concluded that these provisions could not be upheld under section 1 of *Charter*, which allows those rights protected by section 2(d) to be reasonably limited as prescribed by law. In reaching this conclusion the Court took into account the fact that legislation was adopted without any meaningful consultation with the union and that the government failed to present evidence suggesting they considered less intrusive measures. The Court suspended its ruling for 12 months to provide the B.C. Government with time to address the impact of the decision.

The Court stated that the "protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals."

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The Court gave three reasons for extending *Charter* protection to collective bargaining. First, even prior to the *Charter* collective bargaining was recognized in Canadian history as a fundamental aspect of our society. Thus, the protections under s. 2(d) can be seen as a culmination of the historical movement towards recognition of the procedural right to collective bargaining. Second, Canada is a party to several international conventions recognizing the right to engage in collective bargaining and it is reasonable to infer that the *Charter* should offer the same level of protection. Third, guaranteeing such a right is consistent with the values and purposes underlying the *Charter* as a whole.

The Court was clear that in order for a provision to be found in violation of section 2(d), it must constitute a “substantial interference” with associational activity. In order to substantially interfere with the process of collective bargaining, the government must “seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer.” Accordingly, two inquiries must be made to determine whether substantial interference has taken place. First, the matter in question must be sufficiently important to unions’ pursuit of common goals collectively. Second, the provision or government conduct must respect the duty to consult and negotiate in good faith. In order to respect this duty, the government must engage in meaningful dialogue, be willing to exchange and explain their positions, and make a reasonable effort to arrive at an acceptable contract. However, the duty does not impose an obligation to conclude a collective agreement nor to accept any particular provisions and will allow the court to take into account circumstances of exigency and urgency in the legislation’s adoption.

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