



LEGAL UPDATE

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SUPREME COURT OF CANADA DECISIONS ON FREEDOM OF ASSOCIATION ISSUED ON JANUARY 16, 2015

*The Supreme Court of Canada issued two important decisions on freedom of association last Friday. In the first, *Mounted Police Association of Ontario v. Canada (Attorney General)* ("RCMP decision") the Court found that the legislative scheme that excluded the RCMP from collective bargaining through an association of their own choosing that was independent of management violated Section 2(d) of the Charter, the freedom of association provision. In the second companion case *Robert Meredith et al v. Attorney General of Canada* ("Meredith decision") the Court ruled that it was not a violation of Section 2(d) for the Government to unilaterally roll back wage increases for the RCMP through the Expenditure Restraint Act ("ERA").*

RCMP DECISION

Historically, members of the RCMP have been excluded from the general public service labour relations statute, the *Public Service Labour Relations Act* ("PSLRA"). Instead, they are required to address labour relations issues through a Staff Relations Representative Program ("SRPP"). The Court ruled that the exclusion from the PSLRA and the imposition of the SRPP violated freedom of association protected under section 2(d) of the *Charter* and that the violation was not a justifiable limitation under section 1 of the *Charter*.

The Court ruled that s. 2(d) of the *Charter's* 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." In the view of the Court, "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."

The Court clarified that the legal test for deciding if a law violates Section 2(d) of the *Charter* is "substantial interference" with the right to a meaningful process of collective bargaining. The Court concluded that a meaningful process of collective bargaining is a process "that provides employees with a degree of choice and independence sufficient to enable them to

determine their collective interests and meaningfully pursue them".

The Court struck down the applicable legislation but suspended the operation of the order for 12 months to allow the government to pass new legislation which would satisfy the *Charter*.

MEREDITH DECISION

The *Meredith* decision concerned the federal government's salary restraint legislation, the *Expenditure Restraint Act* ("ERA"), which it passed after the 2008 financial crisis. The ERA imposed a limit of 1.5% on wage increases in the public sector for the 2008 to 2010 fiscal years. The ERA also prohibited any other increases to compensation, although it contained an exception for RCMP members permitting the negotiation of additional allowances as part of transformational initiatives within the RCMP.

In the case of the RCMP members, the Treasury Board of Canada had largely accepted the recommendations of the RCMP Pay Council regarding pay increases for 2008-2009. The ERA resulted in a rollback of wage increases from the previous Pay Council recommendations, from between 2% and 3.5% to 1.5% in each of 2008, 2009, and 2010. The original increase would also have doubled service pay and increased the Field Trainer Allowance. Both of these were also eliminated by the ERA. However, the limits imposed by the ERA were time-limited in nature, shared by all public servants, and did not permanently remove the subject of wages from collective bargaining.

The majority of the Court upheld the validity of the *Expenditure Restraint Act*. The Court noted that while s. 2(d) of the *Charter* guarantees a right to a meaningful labour relations process it

does not guarantee a particular outcome. In determining that the *ERA* did not violate the *Charter*, the Court compared the *ERA* with the impugned legislation in *The Health and Social Services Delivery Improvement Act*, SBC 2002 C.2, Part 2 which had introduced radical changes to significant terms in various health sector collective agreements in B.C. By contrast, it found that the *ERA*:

- (i) capped wage increases for members of the RCMP 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;
- (ii) did not preclude consultation on other compensation-related issues, either in the past or the future; and
- (iii) did not prevent the consultation process from moving forward noting significantly that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing pay council process.

In these circumstances, it was the view of the Court that there was no *Charter* breach as the Pay Council continued to afford RCMP members

a process for consultation on compensation-related issues (albeit within the constitutionally inadequate labour relations framework that was then in place). In concluding that there was no breach of section 2(d) the Court noted that "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".

WHAT IS NEXT AND HOW DOES THIS IMPACT ME?

In the specific *RCMP decision* case the Court has given the government 12 months to provide new legislation which is in compliance with the *Charter*. This does not necessarily mean that the RCMP will be governed by a traditional union/employer model of collective bargaining. The Court noted that the requirements of choice and independence that are required under section 2(d) can be "respected by a variety of labour relations models, as long as such models allow collective bargaining to be pursued in a meaningful way".

While there is no direct impact on Metro Employers, the future development of the law governing freedom of association will be of interest and may potentially impact areas such as essential services legislation, provincial labour

legislation and government's ability to legislate in areas of collective bargaining and collective agreement settlements. There are a number of other section 2(d) constitutional challenges that are in varying stages of completion before the courts. These include other challenges to the *Expenditure Restraint Act*; a challenge to the essential services legislation in Saskatchewan and a case which is currently awaiting a Court of Appeal decision in BC involving the British Columbia Teachers' Federation and the provincial government. Challenges on the basis that the law interferes with the Charter protected right of freedom of association in these cases must show the law "substantially interferes" with the ability to engage in collective bargaining.

QUESTIONS?

If you have any comments or questions about this update please contact Karen Jewell, Program Manager at 604-432-6228 or by email at Karen.jewell@metrovancover.org .

SOURCES

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1 (CanLII), <<http://canlii.ca/t/gfxx8>> retrieved on 2015-01-19

Meredith v. Canada (Attorney General), 2015 SCC 2 (CanLII), <<http://canlii.ca/t/gfxxb>> retrieved on 2015-01-19