Business Council of British Columbia

LEGAL

Supreme Court of Canada on Collective Bargaining

Dentons – On January 16, 2015, the Supreme Court of Canada (SCC) rendered a decision giving section 2(d) of the *Charter of Rights and Freedoms* a much more generous interpretation.

In *Mounted Police Association of Ontario v. Canada* the SCC determined the standing legislated labour relations regime for the Royal Canadian Mounted Police (RCMP) contravenes section 2(d) which protects the right to freedom of association.

Originally, the RCMP were excluded from any sort of labour relations systems, and are still legislatively prohibited from joining a union. In the 1970's several changes planted the seeds for the current Staff Relations Representative Program (SRRP). In general, this scheme was a 'go-between' for staff and management; however, it was accepted and understood that management always had the final say.

In deciding that section 2(d) had been violated, the Court asked if the employee's right to "meaningful process" had been subject to interference. Meaningful process requires employees to have effective input in the associations they may join, leave, and hold accountable. The SRRP was solely controlled by management. The SCC deemed this special labour relations scheme infringed upon section 2(d) of the *Charter of Rights and Freedoms* and could not be justified under section 1. Further, the majority found it unconstitutional to exclude RCMP from the definition of "employee" under the federal *Public Service Labour Relations Act.* The existing scheme will remain in place in 2015 to give the Government time to craft a replacement model, as the Court did *not* go so far as to say RCMP must be *permitted* to join a union.

And on Striking…

Borden Ladner Gervais LLP – In a decision released January 30, 2015, the Supreme Court of Canada (SCC) ruled on another landmark decision. For the first time, and against all former precedents, the right to strike is now constitutionally protected.

In *Saskatchewan Federation of Labour v. Saskatchewan*, The SCC struck down Saskatchewan's *Public Service Essential Services Act* (PSESA) deeming it infringes on the *Charter of Rights and Freedoms*. PSESA prohibits designated "essential services employees" from engaging in a strike against their employers.

The SCC gave reasons as to how the provincial legislation contravenes the *Charter,* including recognizing a deep inequality between employee and employer and that strike action puts pressure on both parties to engage in good faith bargaining. Further, the legislation itself does not speak to any

adequate review mechanism on who or what duties the employer unilaterally deems "essential." The wording of PSESA also lacks clauses that could address alternatives to dispute resolution such as arbitration.

The PSESA can neither be justified under section 1 of the *Charter* as the Court ruled the legislation goes beyond what is reasonably required to maintain essential services for public safety.

This decision reverses 30 years of precedents. Note, there was strong dissent by two Justices who expressed views that the SCC should not intrude into the role of policy makers in matters of labour relations and that it tips the balance that has already been struck.

Amendments to Alberta's PIPA

McCarthy Tetrault – Alberta has recently amended its *Personal Information Protection Act* (PIPA) in response to a Supreme Court of Canada decision which found it infringed on the protected rights of a union's freedom of expression (*Alberta Information and Privacy Commissioner v. United Food and Commercial Workers local 401*). Bill 3 makes small changes that provide conditions unions must meet in their use of personal information during lawful labour disputes:

1. Collecting, using, or disclosing the personal information is for the purpose of informing or persuading the public about a matter of significant public interest or importance relating to a labour relations dispute;
2. Collecting, using, or disclosing the personal information is reasonably necessary for that purpose; and
3. The collection, use, or disclosure of the personal information without consent is reasonable in its situation context, taking into account all relevant considerations, including the nature and sensitivity of the personal information.

Canada Labour Code Makes Certification Tougher

Norton Rose Fulbright – There has been a legislative amendment to Part 2 of the *Canada Labour Code* that takes effect June 16, 2015 that will make it tougher for unions to organize federally regulated employers.

Bill C-525 has done away with automatic certification and re-introduced the secret ballot vote. The former legislation provided for automatic certification if the union could prove more than 50% of employees signed union cards and paid for a union membership. A secret ballot vote was only be required if the union had evidence of support from 35% to 50% of the proposed bargaining unit. Now all certifications will be subject to a secret ballot vote, and only if the union

can show evidence of 40% support from potential members.

Ontario, British Columbia, Alberta, Nova Scotia and Saskatchewan require a secret ballot vote even if there is evidence that more than 50% of proposed bargaining unit employees show support.

It is also now easier for bargaining unit members to de-certify, or remove, their union. A secret ballot vote to de-certify normally would only be triggered with evidence showing more than 50% of employees wanted to remove their union representation. Now, the threshold has been reduced to 40%. At least 35% of the bargaining unit must vote for validity in determining majority.

These changes are important in that they provide employers with the opportunity to communicate factual information about the meaning of unionization before they vote. Before, employers were denied this ability to communicate.