Freedom of Association

LABOUR STRIKES OUT AGAIN

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In an important, recent decision[1] the Supreme Court of Canada held there is no constitutional right to engage in collective bargaining. This case confirms that none of the important rights which trade unions have won over the years are included in the *Charter* guarantee of freedom of association. Such rights are based on legislative policy — not fundamental, constitutional freedoms.

THE DECISION:

Thirty-two nurses were employed by the Federal Government in the Baffin Zone of the Northwest Territories. After responsibility for health care in the region was transferred to the Government of the Northwest Territories, the nurses became employees of the Territorial Government. The union certified to bargain for the nurses under federal legislation wished to continue representing them. So, it sought incorporation under section 42(1)(b) of the Public Service Act R.S.N.W.T. 1974, c.P-13. This would have required the Territorial Government to pass a statute incorporating the union as a bargaining agent. This the Government refused to do. The union then sought a declaration that the provisions of the Northwest Territories statute were inconsistent with the *Charter* guarantee of freedom of association.[2]

A narrow majority of the Supreme Court of Canada recently rejected the claim of the union — holding it was bound by the earlier decision of the Court in the *Alberta Reference*[3]. The closeness of the decision shows how sharply the Court is divided on questions of fundamental freedoms and organized labour.

Preliminary Matters: the Composition of the Supreme Court of Canada

Before looking at the reasons for judgment, a couple of preliminary matters should be considered. One interesting fact is that virtually half of the panel which heard the earlier *Alberta Reference* had left the Court by the time this decision was delivered. Significantly, the writers of the two lead judgements in the *Alberta Reference* (McIntyre and LeDain JJ.) and one of their supporters (Beetz J.) had left the Court. Chouinard J. passed away between the time the arguments were heard and the reasons were issued in that case.

The two dissenters in the *Alberta Reference*, Wilson J. and Dickson C.J.C. remained. The sole survivor of the previous majority was LaForest J. This panel was joined by four new members: Gonthier, L'Heureux Dubé, Sopinka and Cory JJ.. This was as close to a complete change in personnel as labour could have wished.

The structure of the judgement is informative. Sopinka J. wrote the lead judgement for those rejecting the union's argument. Cory J. wrote in dissent and was joined by Wilson and Gonthier JJ.. The reasons of Sopinka J. were supported by LaForest, L'Heureux Dubé JJ. and, most interestingly, by Dickson C.J.C..

The Opinion of Dickson C.J.C.

Here was a case where the role of Dickson C.J.C. was as crucial as it was mysterious. By remaining faithful to the position he had so boldly staked out in the *Alberta Reference*, he could have provided a constitutional foundation for labour law. Instead, holding himself bound by the judgement against which he had powerfully dissented, the former Chief Justice created a new anti-union majority. Thus he leaves a somewhat confusing legacy. In the *Alberta Reference* he wrote a strong opinion in favour of extending constitutional protection to the activities of trade unions — a dissent which could one day have formed the core of a new approach. But in this case he, himself, eliminated this possibility, leaving one with some doubt about where he actually stood on this fundamental issue. Was his preoccupation with precedent not inappropriate in a case raising a fundamental constitutional issue? Surely there was no meaningful way in which he was *bound* by the previous majority. Since the doctrine of *stare decisis* could have no application, did Dickson C.J.C. simply change his mind?

The Majority Opinion of Sopinka J.

In his reasons, Sopinka J. provided a four point summary of the Court's decision in the *Alberta Reference*. His review is a significant sign of the restrictive reading which the Court will give to freedom of association. He started with a small core of meaning and built three concentric definitional circles about it. A review, and commentary upon parts, of his definition is warranted.

(Continued on page 12)

First, beginning with the minimum content of the guarantee, he held "section 2(d) protects the freedom to establish, belong to and maintain an association." The simple act of coming together is thus protected and any state restriction on the formation of, or membership in, associations would violate section 2(d). As Sopinka J. acknowledged, this is the "narrowest conception of the freedom of association."

Second, "section 2(d) does not protect activity solely on the ground that the activity is a foundational or essential purpose of an association." Thus there is a constitutional right to come together but not to do anything.

If taken no further, this conclusion is problematic. An association is defined by what its members do together. A bowling club bowls, a hockey club plays hockey and a union bargains on behalf of its members. Just as a bowling club that could not bowl would not be a bowling club so a union that could not bargain would not be a union. It is simply not meaningful to say there is a freedom to form a union if the union cannot do what union's do. An association is what it does. Sopinka J. would allow us to form associations in name only.

Third, "section 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals." This is the extent of the American conception of freedom of association. It is a right not expressed in the American Bill of Rights but inferred from the inherently collective nature of some rights. In the Canadian context, this interpretation means that section 2(d) is, essentially, a redundant guarantee. It makes express that which could be inferred. For example, freedom of religion must be read as guaranteeing the activity of worshipping in association with others. Obviously, the collective exercise of individuals' constitutional rights is of fundamental importance and it is part of the minimum content of the express guarantee. However, to limit "freedom of association" to protecting something which is necessarily implied even in the absence of the express guarantee is to exhaust prematurely the vitality of the phrase.

Fourth, "section 2(d) protects the exercise in association of the lawful rights of individuals." So, what may be lawfully done by one, may be done in combination with others. Thus, individuals may form and join associations to pursue objects they could lawfully pursue as individuals. This is so because prohibiting individuals from doing together that which they could lawfully do alone would strike at the associational aspect of their collective action.

As Sopinka J. acknowledged, this principle is somewhat "controversial" compared with the first three. In my view, he went further than the majority in the *Alberta Reference* in embracing this principle. Indeed, the proper application of this principle should have led him to the opposite conclusion he reached.

He asserted that "bargaining for working conditions is not, of itself, a constitutional freedom of individuals, it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented." But this merely recites a conclusion — it is not a reasoned position. To state there is no express constitutional freedom for individuals to bargain is to state the obvious. To say there is no individual legal right to bargain in circumstances in which a collective bargaining regime has been implemented is to beg the very question at issue. Had the individuals' legal rights to bargain been extinguished? This question did not receive the attention it deserved.

When the Territorial Government took over responsibility for health care, the thirty-two nurses became "eligible" for membership in the Northwest Territories Public Service Association (NWTPSA). There was a collective agreement between the NWTPSA and the Territorial Government. However, it is unlikely this agreement was binding upon the nurses. The statutory language is very unusual. Section 42(6) provides the collective agreements are binding upon the "members" of an incorporated union.[4] This is a strange provision because in most jurisdictions a collective agreement is binding upon all the employees in a bargaining unit, regardless whether they are members of the union which negotiated the collective agreement. To underscore the point, only those nurses who joined the NWTPSA were bound by a collective agreement. Those nurses who did not join the NWTPSA were not captured by the collective bargaining scheme and were free to engage in lawful individual bargaining with their employer.

Given this fact, the reasoning should have proceeded along the following lines — starting with the proposition that "section 2(d) protects the exercise in association of the lawful rights of an individual":

> What are the lawful rights of an individual?
> - An individual may do that which is not prohibited by law.
>
> Are individuals prohibited from bargaining with their employers about the terms and conditions of their employment?

- No, unless a collective agreement is in existence.

How does a collective agreement come into existence?
- It is formed after collective bargaining between an employer and voluntarily or statutorily recognized bargaining agent. Under the Territorial legislation such a collective agreement is binding only on members of an incorporated employees association.

In the absence of a collective agreement can individuals bargain with their employer?
- Of course.

Were the nurses in this case bound by a collective agreement?
- No. The whole point of the exercise was to get statutory recognition of their bargaining agent so collective bargaining could take place and a collective agreement could be negotiated.

There was nothing in the statutory scheme which expressly prohibited individual nurses from bargaining with their employer. There was no binding collective agreement. So, the nurses had a lawful right as individuals to bargain with their employer. If there is a constitutional right to do together that which it is lawful to do alone, the nurses could form an association to pursue their lawful individual rights. They had a right to engage in collective bargaining with their employer. This is the logical train which follows from the "controversial" proposition adopted by Sopinka J.. It is regrettable he did not follow it.

Instead, proceeding from the finding that collective bargaining could not come within the protection of section 2(d), Sopinka J. went on to examine the restrictive provisions of the Act. He characterized the process of incorporation as a legislated form of voluntary recognition. As nothing in the Act restricted the formation of unions or their ability to apply for incorporation, he concluded there was no restriction of freedom of association. Sopinka J. thus held the legislation passed muster under the narrowest definition of freedom of association. The nurses had the right to form an entity called a trade union.

The Dissenting Opinion of Cory J.

Cory J. began, correctly in my view, by finding he was not bound by the *Alberta Reference*. He carefully sifted through the judgements and concluded that while LeDain J. (on behalf of LaForest and Beetz JJ.) had ruled there was no constitutional protection of collective bargaining, the Chief Justice, Wilson J. and McIntyre J. had left the question open. Therefore, it was for the Court to decide what aspects of collective bargaining were covered by the guarantee of freedom of association.

Cory J. agreed the Northwest Territories Government was not required to implement a scheme for collective bargaining to satisfy the right of the nurses to collective bargaining. However, having introduced a scheme, the Government was obliged to ensure it was constitutional. Here the problem was that the Government retained the unfettered discretion to determine whether and with whom it would bargain. This process of barring employees from bargaining through the agent of their choice struck "at the very heart of the freedom of association."

Cory J. was of the view that the Government could not have absolute discretion to decide with whom it wished to bargain. This position must be right. The power of incorporation enjoyed by the Territorial Government effectively gives the freedom of association to the employer — not the employees. The employer, not the employees, can decide which union will represent employees in collective bargaining. This is the bizarre though inevitable result of the majority decision.

CONCLUSION

This case confirms that the Canadian labour relations system is a product of legislative policy and not based on constitutional guarantees. There seem to be no constitutional values which trade unions may invoke to strike down legislated restrictions on collective bargaining. The reasons of the Court show that organized labour can expect little assistance from the constitution. This decision is the latest and clearest signal that political, not legal solutions, should be sought by labour.

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1. *Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories et al.* [1990] S.C.J. No. 75.

2. Section 2(d) of the *Charter of Rights and Freedoms* provides:
   2. Everyone has the following fundamental freedoms:
   ...
   (d) freedom of association.

3. The *Alberta Reference* is cited as *Reference Re Public Service Employee Relation Act (Alta.)*, [1987] 1 S.C.R. 313.

4. 42(6) A collective agreement between the Commissioner and an employee's association shall be binding on the Commissioner, the employees' association and the members of such association.