

COLLECTIVE NEGOTIATIONS FOR PRINCIPALS AND VICE-PRINCIPALS

In June 2007, the Supreme Court of Canada's decision in *Health Services*¹ changed the law and with it, the legal backdrop for employment relations between principals and vice-principals (principals) and school boards. In previous decisions², the Supreme Court repeatedly refused to include the right to collective bargaining within the *freedom of association* protection guaranteed by s. 2(d) *Charter*³. In *Health Services*, the Court decided that its earlier reasoning could not stand. It established a constitutionally guaranteed right to associate with other individuals for the purpose of relations with their employer including good faith collective negotiations for their conditions of employment⁴.

It is apparent from the cases⁵ that employees who are excluded from certifying as unions under legislated labour regimes⁶, nevertheless still enjoy the same *Charter* fundamental freedom to associate together for the purpose of labour relations. The significant change created by *Health Services* was the expansion of the meaning of the *freedom of association* beyond the right to form associations, to now include the right to collectively negotiate with the employer. This means that employees now have the right not only to join employees' associations, but also to have those associations recognized as their representatives to conduct good faith collective negotiations with employers concerning their conditions of employment. The Supreme Court further declared that there is a corresponding duty placed on governmental employers to engage in a fair and substantive negotiation process with employees' associations⁷.

Some school boards are denying the application of this new right to collective negotiations to the employment relationship with principals. Set out below are the significant pronouncements of the courts in the *Health Services* and *Fraser*⁸ decisions and the analysis leading to the conclusion that principals now have the right to expect good faith collective negotiations with school boards.

HEALTH SERVICES: The Change in the Law

Health Services arose out of a court application against the British Columbia (B.C.) government by health workers for relief from significant changes made by provincial legislation to their negotiated collective agreements. The Supreme Court concluded that the legislation was a governmental infringement upon the health workers s. 2(d) rights and ordered the B.C. government to correct that error.

The Court described the new scope of the protected freedom as follows:

In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to [governmental] employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. ... It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation⁹.

In short, there is now a constitutional right for individuals who join together to form associations to be recognized and to conduct good faith collective negotiations with their employers where no such right previously existed. In explaining its decision, the Supreme Court found that "association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which pre-dated the *Charter* and indeed, the present statutory systems of labour relations"^{10,11}. It is clear from the terms and legal interpretations of the *Charter* that the freedom of

association is fundamental¹². Therefore, it not only protects members of statutorily created trade unions but also voluntary associations of employees.

Significantly, the *Charter's* fundamental rights and freedoms apply only to protect individuals from government action. The *Charter* does not apply between private citizens or corporations. One form of government action is the passage of legislation, but a second form of government action is where the government is acting as an employer. The Supreme Court found that "while a private employer is not bound by s. 2(d), the government as employer must abide by the *Charter*..."¹³

In those circumstances in which the government is the employer, an infringement of employees' *Charter* rights to form associations and bargain collectively will arise where the government substantially interferes, by intent or effect of their actions, with the employees' activity of joining together to pursue the common goals of negotiating important workplace conditions¹⁴. This interference would have to undermine a good faith process of collective bargaining¹⁵.

A long history of cases explains and defines the meaning of *bargaining in good faith*, that is now a requirement of governmental employers with their employee associations. One helpful description of the duty to bargain in good faith from the Supreme Court is as follows:

*...a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*¹⁶

From the *Health Services* decision, it is clear that all Canadian employees have a constitutionally protected right to join together, have their associations recognized as their representative and engage in good faith collective negotiations. If an employer substantially interferes with that right, the affected employees can apply to the courts for a remedy to enforce the right. The nature of the remedy will depend on the particular circumstances of the case. The recent *Fraser* decision in Ontario provides considerable guidance as a precedent of the interpretation and enforcement of this new right.

FRASER: Enforcement of the Right to Collective Negotiations

In *Fraser*, farm workers were applying to the courts for a second time for relief of their infringed s. 2(d) *Charter* rights. In respect of their first application¹⁷, the Supreme Court of Canada ordered the Ontario government to create legislation that would protect the farm workers' right to organize labour associations since the farm workers had been excluded from the labour relations regime of the Ontario Labour Relations Act (OLRA). The farm workers proved to the court that their efforts to create associations had been unsuccessful because of anti-union activities by their private sector employers. The Supreme Court found that, since the private employers were not bound by the *Charter* and the farm workers' efforts to

organize had demonstrably failed, the government of Ontario had a positive duty to pass appropriate legislation specific to the farm workers' situation to support their right to associate.

Although Ontario then passed legislation to support farm workers' right to organize, the legislation did not include the newly protected right to engage in collective bargaining. In the absence of legislation protecting the right to collective negotiations, the farm employers refused to do more than allow a brief presentation of demands from the employees' association after which the employer unilaterally imposed the new conditions. This bad faith approach to the negotiation process was found to have substantially undermined the employees' s. 2(d) rights. Since these private farm employers were not subject to the *Charter*, the Court reasoned that a positive obligation was placed therefore upon the Ontario legislature to pass a statutory regime for the farm workers that would provide a protected meaningful collective bargaining process.

The expanded scope of s. 2(d) does not automatically equate to a right to a legislated labour relations scheme. The Court mandated legislation as the remedy because the farm workers demonstrated that it was virtually impossible to exercise the s. 2(d) rights to organize and bargain collectively with their employers without statutory supports¹⁸.

CONCLUSION: Collective Negotiations Now a Right of Principals and a Duty of School Boards

Before *Health Services*, principals formed associations without interference, but they did not have the right to demand school boards to recognize the associations as exclusive representatives nor to engage with them in good faith collective negotiations for conditions of employment. Since 1998, when principals were excluded from the OLRA, some school boards have voluntarily recognized principals' associations and afforded them a reasonably good faith process for discussing and concluding acceptable conditions of employment. However, there has been a wide range of responses from other school boards to the non-unionization of principals.

A clear principle was established by the Supreme Court's decision in *Health Services* and then reinforced in *Fraser*. A school board's refusal to recognize principals' associations as representative and engage in meaningful good faith collective negotiations is no longer sufficient to meet the legal requirements. A school board that allows only a superficial right of *consultation* with the principals' associations when revising employment conditions will be subjected to redress by the courts.

School boards are governmental employers who are bound to uphold the principles of the *Charter* directly in their relations with their employees¹⁹. They are publicly-funded statutory bodies created for the public's benefit and trust. Unlike private sector employers, the school board's direct duty to comply with the provisions of the *Charter* is

enforceable by way of an application to the Ontario courts. The s.1 *Charter* limitations on the fundamental rights and freedoms can only be “prescribed by law²⁰.” Therefore, in the absence of any legislation limiting the principals’ s. 2(d) rights, there is no legal basis for school boards to deny them the right to collectively negotiate notwithstanding the principals’ status as managers.

The *Charter* protects the freedoms of *everyone* by its very terms.²¹ The freedom of association espoused in s. 2(d) is a right to be enjoyed by individuals when they desire to act in concert. Therefore, like the farm workers in *Fraser*, the fact that principals have been specifically excluded from the application of the *OLRA* does not exclude them from the *Charter* protections of their freedom to create associations and the associated activity of collective negotiations with school boards.

This new duty to negotiate in good faith with the principals’ associations requires school boards to engage in a process beyond a superficial consultation, as has been the practice of some school boards with principals over the past decade. The principals’ associations are well established. For each school board, there is only one principals’ association whose members are the vast majority of principals of that board. Although principals do not have the right to strike, the parties to such good faith negotiations could establish by mutual agreement the scope of representation and a framework for the negotiating process including a mechanism for dispute resolution. Where the parties embrace the new legal landscape, there is no impediment to principals and school boards engaging immediately in collective negotiations.

Principals are different from farm workers since they work in the public sector for school boards, governmental employers. Therefore, a breach by a school board of its *Charter* duties to the principals would give rise to a court ordered remedy requiring the school board to conduct good faith collective negotiations with principals’ associations. Another possible alternative remedy would be a court order directed to the Ontario government to legislate a labour relations regime for principals. However, for this latter order, it likely would have to be proved that school boards are incorrigibly unwilling to uphold their new constitutional obligations to recognize principals’ associations and engage in good faith collective negotiations²².

The Ontario government may voluntarily create such legislation to minimize potential disputes between the principals and the school boards. Indeed, such legislation may be desirable to establish clear guidelines for the new labour rights of principals that are uniform across Ontario. However, it is apparent that the school boards have a direct duty now to uphold *Charter* values and behave as a positive example of good faith dealings for the benefit of the principals and the community at large.

Although some school boards may find this requirement an uncomfortable change, the increased fairness and predictability of their relations with their principals will produce invaluable benefits to all parties involved.

¹*Health Services and Support-Facilities Subsector Bargaining Association, et al. v. Her Majesty the Queen in Right of the Province of British Columbia, e. al.*, 2007 S.C.C. 27

²*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *R.W.D.S.U. v Saskatchewan*, [1987] 1 S.C.R. 460, and *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424.

³*Canadian Charter of Rights and Freedoms* (“*Charter*”), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (1982)* (U.K.), 1982, c.11. The *Charter* was created within the new constitution of Canada to guarantee certain democratic rights and freedoms including the “freedom of association” in s. 2(d). This freedom is a critical protection for the activities of employees who form unions and associations that represent them in dealings with their employers.

⁴*Health Services, supra* paragraph 36.

⁵See *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989., *Dunmore v. Ontario (Attorney General)*, 2001 S.C.C. 94, and *Health Services, supra* note 1, *Ontario Teachers Federation, et al. v. Ontario*, (2000), 132 O.A.C. 218.

⁶For example, a legislated labour relations regime is found in the Ontario *Labour Relations Act, 1995*, S.O. 1995, c.1 (“*OLRA*”). Principals were excluded from participation in certified unions and access to the *OLRA* in 1998 by Ontario legislation. In *Ontario Teachers Federation et al. v. Ontario*, (2000), 132 O.A.C. 218, the Ontario Court of Appeal determined that it did not offend the *Charter* to exclude principals from the *OLRA* since they could still exercise the s.2(d) freedom to form associations and attempt to influence their working conditions voluntarily.

⁷*Health Services, supra*. para. 89-90.

⁸*Fraser v. Ontario (Attorney General)*, 2008 O.N.C.A. 760 (leave to appeal to S.C.C. granted).

⁹*Health Services, supra.*, paras. 89-90.

¹⁰*Health Services, supra.*, paras. 40-41.

¹¹As background, the *Charter’s* purpose is to uphold values of human dignity, equality, liberty, respect to the autonomy of the person and the enhancement of democracy; see *R. v. Zundel*, [1992] 2 S.C.R. 731.

¹²*Health Services, supra.*, para. 25

¹³*Health Services, supra.*, para. 88.

¹⁴*Health Services, supra.*, para. 92.

¹⁵*Health Services, supra.*, para. 97.

¹⁶*Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369.

¹⁷*Dunmore, supra.*

¹⁸*Fraser supra.*, paras. 70 and 104.

¹⁹*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

²⁰*Charter, supra.*, s.1.

²¹*Charter, supra.*, s. 2(d).

²²In a decision released on April 6, 2009, *Mounted Police Association of Ontario et al. v. Attorney General of Canada*, the Ontario Superior Court of Justice struck down as offending *Charter* s. 2(d) the legislation that required employees of the RCMP to belong to a designated association that reported directly to senior management. The minimal consultation process inherent in that scenario undermined the right to meaningful collective bargaining enunciated in *Health Services*. The government was not ordered to create replacement legislation because “[t]he absence of a statutory framework is only a constitutional issue if it leaves those seeking to exercise ss.2(d) freedoms unable to do so.” Since the RCMP employees work for a government employer, they have “direct access to the *Charter* to remedy any interference with their freedom to associate”. However, the striking down was suspended for 18 months to allow the government to consider whether a legislated framework would facilitate an effective process of collective bargaining for these employees.