Federal lawyers lose Charter challenge of wage law

Appeal court decision follows several adverse rulings to unions

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Just weeks after scoring a major victory in their current negotiations, federal lawyers have lost a constitutional challenge of legislation setting maximum wage increases for their previous round of bargaining in a decision by the Ontario Court of Appeal that signals a judicial trend of upholding laws limiting government employees' ability to bargain collectively.

In *Association of Justice Counsel v. Canada (Attorney General)*, the Court of Appeal upheld the validity of the Expenditure Restraint Act, a piece of legislation that limits wage increases for federal employees between the years 2006 to 2011.

The appeal court concluded that the Association of Justice Counsel had failed to demonstrate that the act infringed the rights of its members to engage in a meaningful process of collective bargaining.

The appeal court indicated it must assess the validity of the act based on whether, at the time of its enactment, the parties had the opportunity for a meaningful process of collective bargaining.

If they had, then s. 2(d) of the Charter of Rights and Freedoms that guarantees freedom of association was satisfied.

The decision reflects recent developments in the courts that reinforce the government's ability to take an aggressive bargaining stance in the face of employee demands for higher wages so long as it's acting in good faith in negotiations.

The appeal court's decision allowed the government to set legislation imposing a maximum wage increase after negotiations with the union failed.

"The court has taken a very narrow view of collective bargaining and one that I think is inconsistent with what the Supreme Court of Canada has said," says Steven Barrett of Sack Goldblatt Mitchell LLP.

"I think the Supreme Court of Canada is going to have to decide if collective bargaining means more than collective begging."

Barrett says that as a result of the court decisions, the legislature can essentially come in and do the work for the government employer. He points out that as long as the government employer has been rational, responsive, and gave some indication it would listen during labour negotiations, the courts will uphold the legislation.

“Here, the court is saying that the legislature can do for the government employer what the government may not be able to do on its own.”

Michael Lynk, a professor at Western Law, says the Supreme Court of Canada opened the door much wider to the use of s. 2(d) to challenge legislation with the 2007 decision of Health Services and Support — Facilities Subsector Bargaining Association v. British Columbia, a decision that struck down portions of legislation in that province. In that case, the Supreme Court found s. 2(d) protects the “capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.”

Lynk says that based on that new direction expressed in Health Services, lower courts became more engaged and took more liberal views of what s. 2(d) might mean. He notes that trend in the lower courts came to a halt with the Supreme Court’s ruling in Ontario (Attorney General) v. Fraser in 2011, a decision that found that unless the government made collective bargaining effectively impossible, its actions on that front are unlikely to violate s. 2(d).

Since Fraser, Lynk says there have been many decisions that have dismissed challenges by unions of legislation. The appeal court’s decision in this matter “continues a trend that we’ve seen in the courts, particularly since the Fraser decision, that takes a minimalist view of s. 2(d) and the freedom to association guarantee.”

In this case, the association and the Treasury Board Secretariat had been participating in collective bargaining since May 2006. In November 2008, after negotiations and mediation failed, the board made an offer of a 2.5-per-cent salary increase for the 2006-07 fiscal year; 2.3 per cent for 2007-08; and 1.5 per cent for the next three fiscal years. The association rejected that offer.

In March 2009, the Expenditure Restraint Act came into force that prohibits any salary increases above the amounts set out in the board’s offer.

“The Expenditure Restraint Act was introduced in 2009 to provide a balanced approach to public sector compensation,” said board spokeswoman Theresa Knowles in an e-mail to Law Times. “It provides for responsible spending and fair compensation. Through economic action plan 2012, the government is continuing its commitment to responsible and sustainable public finances.”

After arbitration in June 2009, the arbitrator established the maximum salary increases permitted under the act. As a result, the association launched a constitutional challenge of the act over claims it infringed on the guarantee of freedom of association under s. 2(d).

The association was initially partly successful. The application judge found that the act infringed s. 2(d) “because the act related to salaries, an issue important to collective bargaining, and because it prevented meaningful discussion and consultation between the AJC and the TBS by taking salaries off

the negotiating table." As a result, the court struck the provisions related to imposing caps on salary increases for the 2006-07 year.

Both parties appealed. In its decision, the Court of Appeal referred to Fraser and noted that the Supreme Court held that s. 2(d) "guarantees a process, not a result."

Fraser requires that there must be a "minimal sense of good-faith exchanges" in collective bargaining. However, Fraser also indicates that s. 2(d) "does not impose a particular process" and "does not guarantee a legislated dispute resolution mechanism in the case of an impasse."

The appeal court went on to note that the process between the association and the board "permitted the AJC to present the collective demands of its members to TBS and required TBS to consider those demands in good faith.

While TBS certainly adopted a tough bargaining position throughout, it was not established either that the AJC was denied the full opportunity to present the wage demands of its members or that TBS failed to consider those demands in good faith."

The appeal court acknowledged that the act resulted in the wage settlement from the arbitration becoming a "foregone conclusion" but stated that the association "does not and cannot maintain that the statutory right to arbitration attracts constitutional protection."

The decision follows the association's successful conclusion of negotiations that resulted in a 15.25-per-cent wage increase for federal lawyers over three years.

According to Lynk, it appears that unless or until a union can mount evidence that the government's actions have made collective bargaining effectively impossible, there will be little that will restrain it constitutionally in its involvement and intervention in denying or refusing the right to organize or bargain collectively or the right to strike.

He notes that the right to strike is particularly relevant now in the government's disputes with Canada Post and Air Canada.
Lynk says there's a concern that when the government can't get results at the bargaining table, it will get them through legislation. He adds that the appeal court's decision means there are very few constitutional restraints on the government if it wishes to do that.

While Lynk notes there's no direct effect on the private sector, there may be an indirect one as employers in that area seek restraints as well. "There is a growing opinion on private sector owners that they want to be able to drive down costs in their own areas." He says the public sector's ability to restrain salaries will likely encourage other employers to seek similar wage, benefit, and pension restraints when dealing with their employees.

“It’s a very tough time for collective bargaining, for unions, for workers,” says Barrett.
“At the end of the day, I don’t think unions are so naive to think courts will be their refuge.”