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Our File: 2-594433
Notre dossier:

Your File:
Votre dossier:

June 15, 2011

VIA E-MAIL & PROCESS SERVER

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Dear Mr. Lokan and Ms. Gomez:

Re: Association of Justice Counsel v. Attorney General of Canada
Court File No.: CV-10-404604

Further to my e-mail of May 31, 2011, please find enclosed the Respondent's Supplementary Memorandum of Argument with respect to the above-noted matter.

Yours truly,

Dale Yurka
General Counsel
Regulatory Law Division

DY:ag

Enclosure

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

**RESPONDENT'S SUPPLEMENTARY MEMORANDUM OF
ARGUMENT**

Dated: June 15, 2011

DEPARTMENT OF JUSTICE

Ontario Regional Office
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A. SCOPE OF THE PROTECTION

1. The Supreme Court in *Fraser* reaffirmed that s. 2(d) protects only the right to a process of collective bargaining not a particular model of labour relations, or a specific bargaining method.¹ Nor does s. 2(d) protect a particular outcome² or specific terms of a collective agreement.³

2. What is protected is, exclusively, a meaningful process – which is protected as a “derivative” right without which the exercise of the freedom of association would normally be pointless.⁴

*What s. 2(d) guarantees in the labour relations context is a **meaningful process**. A process which permits an employer not even to consider employee representations is not a meaningful process. To use the language of *Dunmore*, it is among those “collective activities [that] must be recognized if the freedom to form and maintain an association is to have any meaning” (para. 17). Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the Charter to avoid unconstitutionality.⁵ (emphasis added)*

3. The negotiation process between the AJC and the Treasury Board from 2006 to the signed collective agreement in July 2010, included good faith negotiation and meaningful discussion and consultation.⁶ This process did not defeat the applicant’s associating to pursue common workplace goals. To the contrary it was actually an

¹ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at paras.41,45

² *Ibid* at paras.42,45

³ *Ibid* at para.76

⁴ *Ibid* at para.42

⁵ *Ibid*.

⁶ Affidavit of Marc Thibodeau, Respondent’s Record Vol.2 at p.295 para.33

embodiment of what is required under section 2(d) as there was good faith consideration by the employer of the employee representations⁷:

*In summary, Health Services applied the principles developed in Dunmore and explained more fully what is required to avoid interfering with associational activity in pursuit of workplace goals and undermining the associational right protected by s. 2(d). Its suggestion that this requires a good faith process of consideration by the employer of employee representations and of discussion with their representatives is hardly radical. **It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations.***⁸

B. NO SUBSTANTIAL INTERFERENCE WITH COLLECTIVE BARGAINING

1) What constitutes substantial interference

4. In several passages, Justices McLachlin and LeBel equate substantial interference with a standard of effective impossibility:

- (a) *[L]egislation (or the absence of a legislative framework) that makes achievement of this collective goal **substantially impossible**, constitutes a limit on the exercise of freedom of association;*⁹
- (b) *The effect of a process that renders **impossible** the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, in that negates the very purpose of the association and renders it effectively useless;*¹⁰
- (c) *Dunmore established that claimants must demonstrate the **substantial impossibility** of exercising their freedom of association in order to compel the government to enact statutory protections;*¹¹
- (d) *Laws or government action that make it impossible to achieve collective goals **have the effect** of limiting freedom of association, by making it pointless;*¹²
- (e) *If it is shown that it is **impossible to meaningfully exercise** the right to associate due to substantial interference by a law (or absence of laws: see*

⁷ Affidavit Marc Thibodeau, Respondent's Record Vol.2 at p.295 para.33

⁸ Ibid at para.43

⁹ Ibid. at para.32

¹⁰ Ibid. at para.33

¹¹ Ibid. at para.34

¹² Ibid at para. 46

*Dunmore) or by government action, a limit on the exercise of the s. 2(d) right is established...;*¹³

5. Several propositions flow from these excerpts. First, the standard for establishing substantial interference with associational activity is “effective impossibility”, and the burden of providing evidence sufficient to meet this standard rests with the applicant.

6. In this case there was good faith consultation and discussion – indeed negotiation - before the *Expenditure Restraint Act (ERA)* was proclaimed in force. Therefore the question for the court is whether - using a contextual and fact based approach - the process of consultation and discussion regarding both the rapidly declining economy and the potential for legislation before the *ERA* was introduced into Parliament, combined with the limited measures contained in the *ERA*, made meaningful association to achieve workplace goals in all of the circumstances “effectively impossible”.

7. Second, the standard of *effective impossibility* requires the reviewing court to examine the impact of the legislation or government action not on particular terms and conditions of employment but *as a whole*, on the employees’ overall ability to continue to pursue their goals in a meaningful way.

8. *Fraser* has made clear that legislation or conduct that has a substantive impact - ie. limits to wage increases which preclude an arbitrator from awarding any wage increase beyond that provided in legislation as in the AJC case – does not invalidate a procedural right. As reflected in the majority’s consideration and rejection of Justice Rothstein’s dissent:

Rothstein J. argues that the distinction drawn in Health Services between substantive and procedural rights is unworkable. Again, we must disagree. In our colleague’s view, the procedural right to collective activity under s. 2(d) would impinge on the substantive right to a concluded collective agreement rejected in Health Services. However,

¹³ Ibid at para 47.

substantive impact does not invalidate a procedural right. All procedures affect outcomes, but that does not mean that all procedural rights are unworkable. The Charter may protect collective bargaining and not the fruits of that process. (emphasis added)¹⁴

9. A violation of s.2(d) will only be found where, at a minimum, legislation or government action *both* alters existing collective agreements *and* precludes meaningful collective bargaining of future collective agreements.

*[Dunmore] did not, however, define the ambit of the right of association protected by s. 2(d) in the context of collective bargaining. Relying on Dunmore, the majority of the Court in Health Services, per McLachlin C.J. and LeBel J., held that legislation and government actions that repealed existing collective agreements and substantially interfered with the possibility of meaningful collective bargaining in the future constituted a limit on the s. 2(d) right of freedom of association.*¹⁵

*By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had “substantially interfered” with the s. 2(d) right of free association, and had failed to justify the resultant limitation on the exercise of the right under s. 1 of the Charter (paras. 129-161).*¹⁶ (emphasis added)

10. Moreover access to a statutory mechanism for resolving bargaining impasses is not protected.¹⁷ What is protected is the workers’ constitutional right to make collective representations and to have them considered in good faith and for the employer to engage in a process of meaningful discussion.¹⁸

11. As a consequence where the government has consulted and discussed with the bargaining agent in a manner consistent with the duty to bargain in good faith and yet such discussions have failed to result in an agreement, the government is entitled to proceed with legislated imposition of terms.

¹⁴ Ibid at para.84

¹⁵ Ibid. at para.34

¹⁶ Ibid. at para.37

¹⁷ Ibid at para. 47

¹⁸ Ibid at paras.51,54


12. In such circumstances implementation of legislation will not render the freedom of association “effectively useless” because the manner in which the legislation was introduced ensured that the employees’ freedom of association remained meaningful -- even if the bargaining agent did not ultimately obtain the result they wanted – namely wage increases in excess of 35%.

13. In this case, the applicant has adduced no evidence to show that the *Expenditure Restraint Act* rendered the exercise of employees’ freedom of association impossible. Indeed, the opposite is true: the record shows that the government respected the associational freedoms of the applicant’s members and that those freedoms have continued to be exercised.


14. For these reasons, the applicant has failed to establish a breach of section 2(d) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 15th day of June, 2011.



Dale Yurka



for Kathryn Hucal

Solicitors for the Respondent

ASSOCIATION OF JUSTICE COUNSEL

AND

ATTORNEY GENERAL OF CANADA

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**SUPPLEMENTARY MEMORANDUM OF
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