Court File No. 32968

IN THE SUPREME COURT OF CANADA
(on Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent in the Court of Appeal)

- and -

MICHAEL J. FRASER
on his own behalf and on behalf of the
UNITED FOOD AND COMMERCIAL WORKERS UNTION CANADA,
XIN YUAN LIU, JULIA McGORMAN and BILLIE-JO CHURCH

Respondents
(Appellants in the Court of Appeal)

- and -

ONTARIO FEDERATION OF AGRICULUTRE

Intervener
(Intervening Party in the Court of Appeal)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF NEWFOUNDLAND & LABRADOR, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF QUEBEC and ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

FACTUM OF THE INTERVENER CANADIAN POLICE ASSOCIATION

PART I – OVERVIEW

1. The Canadian Police Association ("CPA") is an umbrella organization representing municipal, provincial and federal police associations across Canada. The CPA's 160 member associations are the collective bargaining agents for their respective police membership. In

Canada, all police forces other than the RCMP are unionized.

2. All police officers in Canada are prohibited from striking.[1]

3. The CPA's position is that s. 2(d) protects a process of collective bargaining that involves meaningful negotiations between an employer and a representative bargaining agent.

4. In order for there to be meaningful negotiations, s. 2(d) requires employer recognition of representative bargaining agents. The legislature must provide more than voluntary recognition, which has historically been unsuccessful in Canada. Recognition should also not be reduced to the right to strike, as striking is, in many cases, practically impossible for both employers and employees and, in the case of police officers, statute barred for sound policy reasons.

5. Section 2(d) also requires a mechanism for resolving impasses arising in the course of good faith negotiation. If no such mechanism exists, then at some point in the process employers will be able to unilaterally impose workplace conditions. This is antithetical to the very nature of negotiation. However, again, the impasse resolution mechanism mandated by s. 2(d) should not be limited to the right to strike, as there are sound practical and policy reasons why some employees cannot strike and for preventing others, such as police officers, from striking.

6. Finally, the police model of collective bargaining demonstrates that there can be effective collective bargaining without the "full panoply" of protections provided by the *Labour Relations Act, 1995*.[2] It is therefore clear that Winkler C.J.O.'s decision in the court below does not constitutionalize a particular statutory regime or a particular model of collective bargaining. His decision provides an appropriately wide constitutional umbrella that protects both employees' ability to associate to pursue workplace goals as well as legislatures' legitimate policy interests in crafting labour legislation that is responsive to particular industries and classes of employees.

PART II – POSITION ON THE ISSUES

[1] *Police Collective Bargaining Act*, R.S.A. 2000, c. P-18, s. 3; *Fire and Police Services Collective Bargaining Act*, R.S.B.C. 1996, c. 142, ss. 2-5; *The City of Winnipeg Charter*, S.M. 2002, c. 39, ss. 170-73; *Industrial Relations Act*, R.S.N.B. 1973, c. 1-4, s. 80; *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17, s. 45; *Trade Union Act*, R.S.N.S. 1989, c. 475, s.52A, *Police Services Act*, R.S.O. 1990, c. P.15, s. 122, 124 ("*PSA*"); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 41(5); *Labour Code*, R.S.Q., c. c-27, s. 105; *An Act Respecting the Syndical Plan of the Sûreté du Québec*, R.S.Q., c. R-14, s. 6; *Public Services Essential Services Act*, S.S. 2008, c. P.42.2, s. 15(1).

[2] S.O. 1995, c. 1, Schedule A ("*LRA*").

7. The CPA takes the position that the *Agricultural Employee Protection Act, 2002*,[3] infringes s. 2(d) of the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1 of the *Charter*. The CPA further takes the position that s. 3(b.1) of the *LRA* does not violate s. 2(d) of the *Charter*. Finally, the CPA takes no position on the s. 15 issue raised by this appeal.

PART III – ARGUMENT

A. Section 2(d) Requires that Governments Not Substantially Interfere With The Duty to Bargain in Good Faith

8. In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, the majority concluded that s. 2(d) provided constitutional protection for a process of collective bargaining that included "the duty [of employers and employee associations] to consult and negotiate in good faith".[4]

9. In their reasons, McLachlin C.J. and LeBel J. adopted this definition of collective bargaining from Professor Bora Laskin (as he then was):

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.[5]

10. This passage aptly describes the process of collective bargaining protected by s. 2(d). Section 2(d) protects: (1) a procedure through which terms and conditions of employment may be settled by negotiation between employer and employees on the basis of comparative equality of bargaining strength, and (2) that is undertaken by representatives chosen by employees, not through those selected, nominated or approved by their employer.

a. Meaningful Negotiation Includes Recognition of Representative Bargaining Agents and a Mechanism for Resolving Impasses

11. In numerous passages, *Health Services*, *supra* affirms that s. 2(d) includes more than a "mere right [of employees] to make representations."[6] Section 2(d) also imposes "corresponding

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[3] S.O. 2002, c. 16 ("*AEPA*").
[4] 2007 SCC 27 at para. 97 ("*Health Services*").
[5] *Ibid*. at para. 29
[6] *Ibid*. at para. 114.

duties on the employer … to meet and to bargain in good faith in the pursuit of a common goal of peaceful and productive accommodation."[7]

12. The CPA's position is that, to be effective, the protected process of collective bargaining must include at least three elements: (1) the negotiations themselves must be undertaken in "good faith", meaning that the parties must "actually meet and … commit time to the process"[8] and may engage in hard bargaining, but not surface bargaining;[9] (2) the employer must recognize a representative employee association as bargaining agent for the employees, where such exists; and (3) there must be a mechanism for resolving disputes if the parties reach an impasse.

13. This Court has recently provided guidance on good faith negotiation.[10]

14. This Court now has the opportunity in this appeal to provide guidance on the second and third elements (recognition and impasse resolution).

15. Recognition is a critical element of the duty to bargain in good faith.[11] Without employer recognition of a representative bargaining agent, the employer is free to bargain exclusively with individual employees (even where employees have formed an association for bargaining purposes) or with employer-selected representatives. The first option undermines the collective aspect of the s. 2(d) right. The second undermines the associational aspect (i.e. that employees should be free to associate with whomsoever they choose, not with whoever is chosen by their employer).

16. An impasse resolution mechanism is also critical for good faith negotiations. Without such a mechanism, an employer generally has nothing to lose from an impasse. The absence of an impasse resolution mechanism may even encourage surface bargaining if an employer knows that there is no chance that it will have to answer for its conduct, a situation which this Court has expressly rejected.[12]

17. Historically in Canada, employees and employers resolved impasses by exerting their

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[7] *Ibid*. at para. 90.
[8] *Ibid*. at para. 100.
[9] *Ibid.* at paras. 104-105.
[10] *Ibid.* at paras. 98-106
[11] See, generally, George W. Adams, *Canadian Labour Law*, 2d. Ed. (Canada Law Book: Aurora, ON, 2009) at 10.1500-10.1575.
[12] *Supra* note 8.

economic power, normally by means of strike or lockout. In the absence of a legislative scheme which provides a substitute, employees must withdraw their services to press an issue.

18. Implicit in the Appellant's argument that the *AEPA* does not prevent free and voluntary collective bargaining is the assumption that both parties are free to use their economic power in an unconstrained manner. The assumption is that if employees wish to bargain collectively and their employer refuses, employees are free to join together to take issue with their employer's refusal (i.e. strike).

19. Because of the economic disruption caused by unpredictable and frequent strikes, modern labour relations statutes in Canada replaced recognition strikes with statutory mechanisms for voluntary recognition and certification of bargaining agents.[13] These modern statutes also restricted employees' ability to strike lawfully to the negotiation of a collective agreement. During the term of a collective agreement, employees are required to refrain from striking.[14] This was all part of a complex series of tradeoffs between employers and employees, known as the Wagner Act model of collective bargaining.[15]

20. In the present appeal, the Respondents do not seek a 'strike' mechanism to foment recognition or resolve impasses in negotiation.[16] Presumably, the Respondent's recognize that striking is not a practical mechanism for agricultural employees.

21. In the policing context, it is not practical difficulties that preclude striking. It is a legal impediment. All Canadian police officers are prohibited from striking.[17] The CPA does not take issue with these statutory prohibitions of police strike action. However, the CPA's view is that this Court should hold that s. 2(d) requires a method of recognition and impasse resolution other than strike action because some employees in Canada are precluded from striking for sound practical or policy reasons.

22. The history of labour relations in Canada demonstrates that – with very few exceptions –

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[13] *Ibid.* at paras. 54, 60. See, e.g., *LRA*, *supra* note 2, s. 10(1), 16.
[14] See, e.g., *ibid.*, *LRA*, s. 45.
[15] *Supra* note 13 at para. 60.
[16] Respondent's Factum at para. 65.
[17] *Supra* note 1.

voluntary recognition has not been successful.[18] Employers have typically resisted acknowledging even certified bargaining agents, let alone voluntarily recognizing unions in the workplace.[19] For this reason, the constitutional minimum must include some mechanism other than voluntary recognition, especially when a recognition strike is not permitted.

23. Moreover, employees who are left without a means of influencing the employer where negotiations have reached an impasse are put in a "take it or leave it" position, antithetical to this Court's emphasis on "meaningful negotiations".[20] As MacDonnell J. said in his reasons in *Mounted Police Association of Ontario v. Canada (A.G.)*, "[i]f one side can unilaterally determine the outcome of the 'negotiations', it can hardly be said that there is a comparative equality of bargaining strength."[21]

24. While traditional interest arbitration has been the common means of third party resolution of collective bargaining impasses in the police context, the CPA recognizes that this common mechanism may not, by itself, be a constitutional minimum, especially given the complex system of tradeoffs between employers and employees under collective bargaining statutes. There are other variations that may be included with and assist third party resolution, including: final offer selection, mediation, conciliation, and court intervention. However, it is essential that a protected process of collective bargaining include some form of impasse resolution mechanism in order to ensure that bargaining is meaningful.

25. The Appellant objects that a "right to compulsory arbitration [in lieu of the right to strike] is, in fact, the right to a state imposed bargaining outcome, or in other words, the right to a binding collective agreement."[22] Presumably, the basis for this claim is that where an employer is strong enough to resist the strikers' demands, not even a strike can guarantee that a collective agreement will be concluded in an unregulated labour market.[23]

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[18] Roy J. Adams, "Industrial Relations under Liberal Democracy: North America in Comparative Perspective (Columbia, S.C.: University of South Carolina Press, 1995) c. 4, reprinted in *Labour and Employment Law: Cases, Material and Commentary*, 7th ed. (Irwin Law: Toronto, 2004) at p. 172.

[19] *Ibid.* at p. 174-75.

[20] *Health Services*, *supra* note 4 at para. 91.

[21] (2009), 96 O.R. (3d) 20 (S.C.J.) at para. 49 ("*M.P.A.O.*").

[22] Appellant's Factum at para. 149 ("AF").

[23] The CPA notes that this position seems at odds with the Appellant's position that agricultural employers are uniquely vulnerable to strikes. If they are uniquely vulnerable to collective action, it would be difficult to believe that an agricultural employer could muster the strength to resist a strike.

26. However, while the ability to strike may well be a constitutionally satisfactory minimum in an unregulated market, this is not the current reality of Canadian labour relations. For instance, where the legislature has stepped in to prevent a class of employees from striking, negotiation will not be meaningful unless the legislature provides these employees with an alternative. Similarly, the legislature may have a positive obligation to provide an alternative where employees are unable to strike for other reasons.

27. Whether to allow certain classes of employees either the ability to strike or an alternative to striking is ultimately a policy decision that a government must make when crafting labour legislation. Whatever the outcome of those decisions, the CPA's position is that a balance must be maintained, so far as possible, to ensure that meaningful negotiations occur.[24]

28. *b. The Bargaining Agent Must Be Representative*

29. The bargaining agent must be representative for two reasons.

30. First, as noted above, the very nature of freedom of association requires that employees be free to associate with whomsoever they choose.

31. Second, that an employer must negotiate with a representative bargaining agent is implicit in the majority's reasons in *Health Services*, *supra*, specifically the reliance on *Charter* values.

32. In *Health Services*, *supra*, the majority concluded that collective bargaining enhances human dignity, equality, liberty, respect for the autonomy of the person and democratic values.[25] Employer recognition of a non-representative bargaining agent would be inconsistent with these values. For instance, it does not enhance human dignity, liberty or the autonomy of the person for an employer to dictate with whom he or she will negotiate with no input from employees.

33. Further, in the Canadian labour relations context, experience has shown that employers should be required to recognize representative bargaining agents who are exclusive, majoritarian

[24] As MacDonnell J. said in *M.P.A.O.*, *supra* note 21 at para. 47, "[i]t is difficult to conceive of, as a negotiation, let alone as bargaining, a process in which employees can make no offer to management of a *quid pro quo* because management can have the *quid* regardless of whether it surrenders the *quo*."

[25] *Health Services*, *supra* note 4 at paras. 80-85.

representatives to ensure an effective process.[26]

34. In this way, a constitutionally protected process of collective bargaining respects equality and democracy. This approach enhances equality because employer recognition of exclusive, majoritarian representatives puts employees in a better position "to palliate the historical inequality between employers and employees."[27] Democracy is also enhanced because employer recognition of exclusive, majoritarian representatives allows "workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace."[28]

35. Allowing employers to recognize multiple representative agents will fracture workplaces and provide a less meaningful process of collective bargaining for Canadian employees. Such a process would be less equal because fractured groups of employees will exercise less economic strength than exclusive, majoritarian representatives. Moreover, it would be less democratic as the Canadian approach to democracy favours aggregation over fractured representation.[29]

36. The Appellant says that exclusive, majoritarian representatives are not a constitutional minimum.[30] For the reasons above, the CPA disagrees. However, in this regard – as in many others – the Appellant would have this Court look to other models of labour relations in countries with very different laws and very different social histories from Canada's.

37. The CPA asks this Court to exercise caution in its analysis of the alternative models presented by the Appellant.[31] Labour relations regimes provide a "complex web of rules" regulating the employment relationship within a jurisdiction.[32] Making selective choices of what a particular labour relations regime includes or does not include can be misleading when these issues are treated in isolation from other strands of these webs.[33]

38. To take one example, the Appellant says that in Sweden "there is no legal process … for

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[26] See, e.g., *Fraser v. Ontario (A.G.)*, 2008 ONCA 760 at paras. 87-88 and the authorities cited by Winkler C.J.O. therein.

[27] *Health Services*, *supra* note 4 at para. 84.

[28] *Ibid*. at para. 85.

[29] See, e.g., *Figueroa v. Canada (A.G.)*, 2003 SCC 37 at para. 98 (*per* LeBel J.).

[30] See, e.g., AF at para.106.

[31] AF at paras. 129-134.

[32] Roy Adams, *supra* note 18 at p. 169

[33] As the Appellant's own authority says in relation to the diverse impasse resolution mechanisms used in European jurisdictions, "solutions rarely transfer with ease between" jurisdictions. See *The Regulation of Working Conditions in the Member States of the European Union*, v. 1 (Employment & Social Affairs: Belgium, 1999) at p. 103.

resolution of bargaining impasses."[34] In reality, Sweden has a system of voluntary conciliation to assist employers and employee associations to prevent imminent labour unrest.[35] Moreover, the Swedish constitution provides "a constitutional right to undertake or organise industrial action."[36] This Court must be careful when pulling apart one strand of the complex web of rules regulating employment in a foreign jurisdiction that this does not lead to erroneous conclusions.

B. The Police Model: Section 2(d) Does Not Require the "Full Panoply" of LRA *Collective Bargaining Rights to be Effective*

39. The CPA agrees with the Appellants that s. 2(d) does not require that the Ontario government extend the LRA to cover all employees in Ontario.

40. This is clear from the majority decisions in both *Health Services*, *supra*[37] and *Dunmore v. Ontario (A.G.)*. In *Dunmore*, *supra*, Bastarache J. said that s. 2(d) does "not necessarily mandat[e]" that the Ontario legislature "extend the full panoply of collective bargaining rights in the *LRA* to agricultural workers."[38] In other words, s. 2(d) may not require access to a particular statutory regime or model of collective bargaining. Rather, what it does require is minimal government intervention to assist a meaningful and effective process of collective bargaining.[39]

41. Police collective bargaining statutes provide a notable model of how governments can legislate so as to protect the core of the collective bargaining process, while at the same time reflecting the many and diverse policy choices raised when legislating the labour relations of a specific group of employees.

42. For example, to address the unique and important public purpose police serve, Ontario's *Police Services Act* in Ontario sets out the matters that may become the subject of bargaining:

> The parties shall bargain in good faith and make every reasonable effort to come to an agreement dealing with the remuneration, pensions, sick leave credit gratuities and grievance procedures of the members of the police force and, subject to section 126, their working conditions.[40]

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[34] AF at para. 133.
[35] *Supra* note 33 at p. 106.
[36] *Ibid.* at p. 108.
[37] See, e.g., *Health Services*, *supra* note 4 at para. 91.
[38] 2001 SCC 94 at para. 66.
[39] *Supra* note 37 at para. 92.
[40] *PSA*, *supra* note 1, s. 119(3).

43. Other matters are expressly excluded from becoming the subject of collective bargaining between police associations and their employers. These include: (a) the duties of a police officer (s. 42); (b) the criteria for hiring officers (s. 43); (c) the probationary period (s. 44); (d) the limits on political activity (s. 46); (e) the accommodation of needs of disabled members of a municipal police force (s. 47); and (f) police discipline (Part V and s. 65(17)).

44. Clearly, these are not insignificant matters. Other provinces have made different choices about what is in the public interest to legislate in this context.[41]

45. However, even with these exclusions, what remains in Ontario and elsewhere in Canada is a wide array of "working conditions" for police officers to negotiate with their employers. In Ontario, they do so through a process of collective bargaining that includes a duty to bargain in good faith,[42] through a representative bargaining agent[43] and with a mechanism for resolving bargaining impasses.[44] As a result, the collective bargaining experience of police officers has been an effective exchange between associations and their employers.

46. While the Ontario approach to police collective bargaining may fall short of the "full panoply of collective bargaining rights" provided by the *LRA*, the *PSA* nevertheless establishes a framework for meaningful negotiations. Moreover, the *PSA* does so while respecting the unique policy issues raised by labour relations in the police context as identified by the legislature.

PART IV – COSTS

47. The CPA does not seek costs, and asks that no costs be awarded against it.

PART V – DISPOSITION OF THE ISSUES AND ORAL ARGUMENT

48. The CPA seeks a disposition of this appeal that is consistent with the principle that an effective process of collective bargaining must include recognition by employers of representative bargaining agents, as well as a mechanism to resolve impasses arising in the course of good faith negotiations, neither of which should be limited to the right to strike.

49. The CPA asks leave to present 15 minutes of oral argument at the hearing of this appeal.

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[41] For instance, in Alberta, British Columbia and Saskatchewan, there are no restrictions on what matters police can collectively bargain.
[42] *Supra* note 40.
[43] *Ibid*., s. 119(1).
[44] *Ibid*., s. 122.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 23, 2009

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Ian Roland

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Michael Fenrick

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTES

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms: (d) freedom of association.	2. Chacun a les libertés fondamentales suivantes: d) liberté d'association.

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