



Canadian Foundation *for* Labour Rights

Labour rights are human rights

Backgrounder

Summary of current Charter challenges and their impact on union security in Canada

Updated
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The CFLR is part of the
CANADIAN LABOUR INSTITUTE FOR
SOCIAL AND ECONOMIC FAIRNESS

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Includes three separate challenges: one initiated by the Professional Institute of the Public Service of Canada (PIPSC) and the Public Service Alliance of Canada (PSAC), another initiated by the Federal Government Dockyard Trades and Labour Council (FGDTLC) and another initiated by the Confédération des syndicats nationaux (CSN) and the Union of Canadian Correctional Workers (UCCW)

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Initiated by the Merit Contractors Association of Manitoba with a group of five individual contractors

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SUPREME COURT OF CANADA 2015-2016 DECISIONS

APPENDIX II

CLOSED CASES BETWEEN 2013 AND 2016

NEW CASES

NEW CASES BEFORE THE COURTS IN 2017

CASE # 1

Ontario Public Colleges of Applied Arts and Technology Labour Dispute Resolution Act (Bill 178, November 2017)

Summary of the Legislation

Bill 178 legislated an end to a five-week strike by a province-wide bargaining unit of 12,000 Ontario college faculty employed in Ontario's 24 public colleges. The faculty members are represented by the Ontario Public Service Employees' Union (OPSEU/NUPGE). All matters remaining in dispute were sent to a mediator-arbitrator, who had exclusive jurisdiction to determine all matters that he or she considered necessary to conclude a new collective agreement.

Nature of the Court Challenge

Violation of section 2(d) (freedom of association) of the *Charter* by taking away the right to strike from 12,000 Ontario college faculty.

Initiator of the Challenge

OPSEU/NUPGE

Current Level of Court

OPSEU filed an application and statement of claim on January 23, 2018 at the Ontario Superior Court of Justice.

Union Legal Counsel

OPSEU is represented by David Wright, a partner with Ryder Wright Blair & Holmes LLP, and in-house counsel Eric O'Brien.

Interveners

None at this time

ILO Complaint

No complaint has been filed.

CASE #2

Manitoba Public Services Sustainability Act (Bill 28, June 2017)

Summary of the Legislation

Bill 28 restricted collective bargaining by imposing a two-year wage freeze followed by two years of legislated wage increases in all new public sector collective agreements covering 120,000 public employees in Manitoba. It established a floating four-year period for unionized employees, which began or begins on the expiry of the existing term of a collective agreement or arbitral decision in place as of March 20, 2017. The statutory compensation framework imposed during the applicable period includes a two-year wage freeze, a maximum wage increase of 0.75% in year three and a maximum wage increase of 1.0% in year four. In addition to general salary increases, any other monetary benefits (e.g., premiums, bonuses, allowances etc.) cannot be increased at the bargaining table.

Nature of the Court Challenge

Violation of section 2(d) (freedom of association) and section 7 (the right to life, liberty and security of the person) of the *Charter* by denying 110,000 public employees represented by the plaintiff unions an opportunity to engage in a timely good faith process of collective bargaining

Initiator of the Challenge

The challenge is from a coalition of unions led by the Manitoba Federation of Labour (MFL). The coalition includes the following unions, which collectively represent more than 110,000 members:

- Manitoba Government and General Employees' Union (MGEU/NUPGE)
- Canadian Union of Public Employees, Manitoba Division
- Manitoba Nurses Union
- Manitoba Teachers' Society

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- Manitoba Association of Health Care Professionals
- University of Manitoba Faculty Association
- University of Winnipeg Faculty Association
- Teamsters, Local 979
- International Brotherhood of Electrical Workers, Locals 2034, 2085 and 435
- Public Service Alliance of Canada
- Professional Institute of the Public Service Canada
- United Food and Commercial Workers Union, Local 823
- International Union of Operating Engineers, Local 987
- Unifor
- Legal Aid Lawyers Association
- Association of Employees Supporting Education Services
- United Steel Workers, Locals 7106, 7975, 8223 and 9074
- Winnipeg Association of Public Service Officers, IFTPE Local 162
- United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 254

Current Level of Court

On July 4, 2017, the MFL coalition filed with the Manitoba Court of Queen’s Bench a statement of claim and a notice of motion for an injunction against the Pallister government’s Public Services Sustainability Act.

Union Legal Counsel

The MFL and its coalition of unions are represented by Garth Smorang and Shannon Carson from Myers Weinberg LLP.

Interveners

None at this time

ILO Complaint

No complaint has been filed.

CASE #3

Nova Scotia Public Service Sustainability Act, Bill 148 (August 2017)

Summary of the Legislation

The Act imposed a four-year wage package on Nova Scotia's 75,000 public service employees. The legislation was originally passed in December 2015 but was not proclaimed until August 2017.

It imposed a two-year wage freeze, followed by a 1% increase in year three, a 1.5% increase at the start of year four and an extra 0.5% increase on the last day of the contract for those unions that refused to accept the same offer at the bargaining table or planned to challenge the government's wage offer through arbitration or strike. Effective April 1, 2015, the law also ended the accrual of long service awards for public servants and mandated any accumulated were to be paid at 2014 wage rates.

Nature of the Court Challenge

Violation of section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the Charter.

Initiators of the Challenge

Nova Scotia Government and General Employees Union (NSGEU/NUPGE)

Current Level of Court

On August 30, 2017, NSGEU filed a notice with the Nova Scotia Department of Justice that it intends to begin an application in the Supreme Court of Nova Scotia against the Attorney General of Nova Scotia. The notice requested the Court to make a declaration that Bill 148 violates the rights to freedom of expression and association guaranteed by section 2(b) and section 2(d) of the Charter, and that these violations cannot be justified under section 1.

On December 18, 2017, further notice was provided to the Nova Scotia Attorney General that the Canadian Union of Public Employees (CUPE)

Local 1867, representing highway workers, will join NSGEU in its application. It is expected that this case will not be heard until the Court of Appeal issues its decision in the constitutional reference regarding Bill 148 (See NOTE below).

Union Legal Counsel

NSGEU/NUPGE is represented by Raymond F. Larkin with Pink Larkin in Halifax.

Interveners

No interveners at this stage

ILO Complaint

No complaint has been filed.

NOTE: On August 22, 2017 the Nova Scotia government referred a portion of Bill 148, namely the wage package, to the Nova Scotia Court of Appeal for constitutional review. On October 4, the government announced they were amending its request to also include sections ending the accrual of long service awards for public service employees, a benefit that existed in collective agreements.

In August, the government did not add unions as parties to the proceeding, even though they represented employees directly affected by Bill 148.

As a result, the following unions asked the Court for intervener status in the matter:

- NSGEU/NUPGE
- Nova Scotia Nurses' Union
- Nova Scotia Teachers Union
- CUPE
- Canadian Union of Postal Workers
- Unifor
- International Union of Operating Engineers, Local 727
- Service Employees International Union, Local 2

Intervener status was granted to all on January 19, 2018. This will enable the unions to give evidence regarding the potential impact of Bill 148 on their members.

A hearing on the constitutional reference has not yet been scheduled.

CASE #4

Nova Scotia Teachers' Professional Agreement and Classroom Improvements Act, Bill 75 (February 2017)

Summary of the Legislation

After the Nova Scotia Teachers Union (NSTU) rejected three tentative agreements, the government enacted Bill 75. The Act ended two days of legal strike action by teachers in February 2017 and legislated salaries for Nova Scotia's 9,300 public school teachers in accordance with the guidelines the government had established for the public service under Bill 148: a two-year wage freeze followed by a 1% increase in year three, a 1.5% increase at the start of year four and an extra 0.5% increase on the last day of the contract. (See Case # 3 above.)

The Bill also retroactively ended the accrual of long service awards effective July 1, 2015 and mandated that the awards be paid at 2015 wage rates.

Nature of the Court Challenge

Violation of section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the *Charter*.

Initiators of the Challenge

NSTU

Current Level of Court

On May 17, 2017, NSTU filed a notice with the Nova Scotia Department of Justice that it intends to begin an application in the Supreme Court of Nova Scotia against the Attorney General of Nova Scotia requesting

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that the Court make a declaration that Bill 75 violates the rights to freedom of expression and association guaranteed by section 2(b) and section 2(d) of the *Charter*, and that these violations cannot be justified under section 1.

The application to challenge the constitutionality of Bill 75 was filed with the Nova Scotia Supreme Court on November 3, 2017. On November 23, lawyers for NSTU and the provincial government laid out a timeline for the process. Hearing dates are to be set on December 3, 2018. Between now and then, the two sides are to exchange documents, file affidavits and rebuttals and conduct cross-examination on those documents.

Union Legal Counsel

NSTU is represented by Gail L. Gatchalian with Pink Larkin in Halifax.

Interveners

No interveners at this stage

ILO Complaint

No complaint has been filed.

ONGOING

UPDATE ON CASES BEFORE THE COURTS PRIOR TO 2017

CASE #5

New Brunswick Essential Services in Nursing Homes Act, Bill 41 (May 2009)

Summary of the Legislation

Bill 41, *Essential Services in Nursing Homes Act* (ESNHA) applies to an estimated 3,125 unionized home care and support workers employed in New Brunswick's private nursing homes. The majority of these workers are licensed practical nurses and resident attendants who provide personal care to nursing home residents.

The ESNHA restricts the right to strike for nursing home workers (excluding nurses) by giving the New Brunswick Labour and Employment Board (NBLEB) the right to make a final determination on the level of essential services that must be provided during a strike.

The ESNHA borrows the concept and wording of the essential services designation from the New Brunswick *Public Service Labour Relations Act*, which governs the province's public sector employers and employees, and applies them to a portion of the private sector.

According to the ESNHA, the NBLEB shall determine the following matters if the parties are unable to reach agreement:

services provided by the bargaining unit members that are or will be necessary in the interest of the health, safety or security of nursing home residents

level of service to be maintained

positions in the bargaining unit to be designated essential

The ESNHA also provides that workers employed in designated posi-

tions shall not participate in a strike and no employers shall lock them out. Furthermore, it outlines penalties for failing to comply, including revocation of the bargaining agent's certification.

Nature of the Court Challenge

Violation of section 2(d) (freedom of association) and section 15 (equality rights) of the Charter by denying certain employees the right to strike.

Initiator of the Challenge

Canadian Union of Public Employees' (CUPE) New Brunswick Council of Nursing Home Unions (NBCNHU)

Current Level of Court

This case is before the NBLEB.

In November 2011, the New Brunswick Association of Nursing Homes Inc. (NBANH) applied to have the Board establish essential services level for nursing home care workers. This stemmed from an issue that arose under the collective agreement as to whether services provided by Licensed Practical Nurses (LPNs) and Residents' Attendants (RAs) ought to be designated essential. At the time, both the Council and the Association agreed that the essential services issues for all the relevant nursing homes would be addressed by using the province's largest long-term care facility, York Manor in Fredericton, as a template.

It was also agreed that the Council's Charter challenge related to the ESNHA would be stayed pending the release of the Supreme Court of Canada decision in the Saskatchewan Federation of Labour case 2015 (see Case # 14, pages 16–19 in [Backgrounder: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#)).

The Board subsequently ruled on October 31, 2014 that the services provided by the RAs and LPNs are necessary in the interest of the health, safety or security of the residents and that the level of service to be maintained in the event of a work stoppage is to be 90%.

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A two-day hearing was held by the Board on CUPE's Charter challenge in September 2017, followed by the parties completed written submissions. Replies to those submissions were due February 1, 2018, and the Board is then to render a decision.

Union Legal Counsel

NBCNHU is represented by Joël Michaud and Brenda Comeau from Pink Larkin out of its Fredericton office and Glen Gallant, in-house counsel for CUPE.

Interveners

Employer side: Province of New Brunswick

ILO Complaint

No complaint has been filed with respect to the ESNHA.

CASE # 6

New Brunswick Act Respecting Pensions under the Public Service Superannuation Act, Bill 11 (January 2014)

Summary of the Legislation

Bill 11 repeals the *Public Service Superannuation Act* (PSSA) and converts the defined-benefit pension plan under the PSSA into a shared-risk plan for public sector employees and retirees. This plan covers roughly 19,000 workers and 13,000 retirees.

Nature of the Court Challenge

Bill 11 is unconstitutional as it violates section 2(d) (freedom of association) of the Charter by preventing free and fair collective bargaining over an important term, namely a pension plan, of employment. The challenge seeks to strike down Bill 11 and, alternatively, to strike down provisions of the New Brunswick Public Service Labour Relations Act that prohibit bargaining over pensions.

Initiators of the Challenge

The Professional Institute of the Public Service Canada (PIPSC)

Current Level of Court

PIPSC filed a statement of claim with the New Brunswick Court of Queen's Bench on February 26, 2016. A statement of defense was filed with the Court on June 30, 2016 by the Province of New Brunswick. A reply was filed with the Court on August 19, 2016 by the Institute. A hearing has not yet been scheduled.

Union Legal Counsel

PIPSC is represented by Peter Engelmann and Colleen Bauman with Goldblatt Partners LLP.

Interveners

Union side: Canadian Union of Public Employees

ILO Complaint

No complaint has been filed with respect to Bill 11.

Case #7

Ontario Toronto Transit Commission Labour Disputes Resolution Act, Bill 150 (March 2011)

Summary of the Legislation

Bill 150 declared the Toronto Transit Commission an essential service, which took away its workers' right to strike.

Nature of the Court Challenge

Violation of section 2(d) (freedom of association) for denying transit workers their right to strike

Initiators of the Challenge

Amalgamated Transit Workers (ATU) Local 113 and the Canadian Union of Public Employees (CUPE) on behalf of CUPE Local 2.

Current Level of Court

Both ATU Local 113 and CUPE Local 2 filed an application in October 2015 at the Ontario Superior Court of Justice. A new affidavit was filed by the new President of ATU Local 113 in November 2017. A Court hearing has not yet been scheduled but is expected to take place towards the end of 2018.

Union Legal Counsel

ATU Local 113 is represented by Josh Phillips, a partner at Ursel Phillips Fellows Hopkinson LLP. CUPE Local 2 is represented by in-house counsel Gavin Leeb and by David Wright, a partner with Ryder Wright Blair & Holmes .

Interveners

No interveners at this stage

ILO Complaint

ATU filed an International Labour Organization (ILO) complaint (Case # 3107) against Bill 150 in December 2014. The ILO Committee on Freedom of Association ruled in March 2016 that Bill 150 violated the ILO's freedom of association principles.

Case #8

Federal Economic Action Plan, Bill C-59 (June 2015)

Summary of the Legislation

The Act implemented provisions of the federal budget tabled in Parliament on April 21, 2015 and other measures. Sections 254 to 269, or Division 20 of Part 3 of the Act, gave the federal government the power to override the Public Service Labour Relations Act and unilaterally amend the sick leave provisions contained in collective agreements covering employees of the core federal public service.

Nature of the Court Challenge

Violation of section 2(d) (freedom of association) of the *Charter* in that the legislative changes interfere with meaningful collective bargaining by reducing the negotiating power of unions.

Initiators of the Challenge

There are two separate challenges. The first is led by the Professional Institute of the Public Service of Canada (PIPSC) and the Canadian Association of Professional Employees (CAPE) on behalf of 12 of the 17 unions representing federal public employees. The second challenge is led by the Public Service Alliance of Canada (PSAC).

Current Level of Court

PIPSC and CAPE filed a statement of claim on June 29, 2015 and PSAC filed a statement of claim on June 30, 2015. Both were filed with the Ontario Superior Court.

On October 17, 2017, the federal government introduced Bill C-62, An Act to amend the Federal Public Sector Labour Relations Act and other Acts. Among other things, Bill C-62 would repeal the Division 20 provisions of Bill C-59 that authorized the Treasury Board to establish and modify, despite the Federal Public Sector Labour Relations Act, terms and conditions of employment related to the sick leave of core public administration employees.

This case is in abeyance pending such time as Bill C-62 is enacted, which will repeal Section 20 of the Bill C-69. Bill C-62 went through second reading February 2 and was referred to committee.

Union Legal Counsel

PIPSC and CAPE are represented by Peter Engelmann and Colleen Bauman with Goldblatt Partners LLP. PSAC is represented by Andrew Raven, a partner with Raven, Cameron, Ballantyne & Yazbeck LLP.

Interveners

No interveners at this stage

ILO Complaint

In September 2015, Canada's 18 federal public service unions filed an International Labour Organization (ILO) complaint (Case # 3151) against Division 20 of Bill C-59. In March 2017, the ILO Committee on Freedom of Association ruled that Bill C-59 did not conform with ILO

freedom of association principles and asked that the federal government keep it informed on progress made to repeal portions of Bill C-59.

CASE #9

Federal Economic Action Plan 2013 Act, No. 2, Bill C-4 (December 2013)

Summary of the Legislation

Bill C-4 amends the federal *Public Sector Labour Relations Act* (PSLRA), making it illegal for any bargaining unit to strike if 80% or more of the positions in that unit are declared necessary for providing an essential service. With limited consultation incorporated into the determination process, the federal government is given the “exclusive right” to determine which services are essential and the number of positions required to provide those services.

Under the former essential services regime, unions and government negotiated the number of employees considered essential. If the two sides couldn’t agree, the matter was turned over to the Public Service Labour Relations Board to decide which jobs would be designated essential in the event of a strike.

Further changes under the bill include limiting the use of arbitration for resolving disputes. Before, unions were free to choose between strike action or binding interest arbitration. Now, however, when the employer designates fewer than 80% of a unit’s employees essential, the amended PSLRA requires the union to proceed by way of conciliation or strike, unless the employer agrees otherwise.

As well, in circumstances where the union is entitled to proceed to interest arbitration, the arbitration board must give primary consideration to the government’s “fiscal circumstances relative to its stated budgetary policies.”

Note: This legislation is similar to the 2008 Saskatchewan Public Ser-

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vice Essential Services Act which was ruled unconstitutional by the Supreme Court of Canada in January 2015 (see Case # 14, pages 16–19 in [Backgrounder: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#))

Nature of the Court Challenge

Denial of the right to strike violates section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the *Charter*.

Initiators of the Challenge

Two separate applications were filed: one by the Public Service Alliance of Canada (PSAC) and the other by the Professional Institute of the Public Service of Canada (PIPSC). They will be litigated together.

Current Level of Court

PSAC filed an application with the Ontario Superior Court of Justice on March 24, 2014; PIPSC filed its application on May 14, 2014.

On October 17, 2017, the federal government introduced Bill C-62, An Act to amend the Federal Public Sector Labour Relations Act and other Acts. Among other things, Bill C-62 will repeal those sections of Bill C-4 that amended the Federal Public Sector Labour Relations Act as noted above. Its enactment will restore procedures for choice of dispute resolution process including those involving essential services, arbitration, conciliation and alternative dispute resolution.

Therefore, this case is in abeyance pending such time as Bill C-62 is enacted. Bill C-62 went through second reading February 2 and was referred to committee.

Union Legal Counsel

PSAC is represented by Andrew Raven, a partner with Raven, Cameron, Ballantyne & Yazbeck LLP. PIPSC is represented by Peter Engelmann and Colleen Bauman from Goldblatt Partners LLB.

Interveners

No interveners at this stage

ILO Complaint

Canada's 18 federal public service unions filed an International Labour Organization (ILO) complaint (Case # 3143) against Bill C-4 in May 2015. In March 2017, the ILO Committee on Freedom of Association ruled that Bill C-4 did not conform with ILO freedom of association principles and asked that the federal government keep it informed on progress made to correct the contraventions.

CASE #10

Federal Act to Provide for the Continuation and Resumption of Air Service Operation, Bill C-33 (March 2012)

Summary of the Legislation

The Act substantially interfered in the collective bargaining process between Air Canada and its 8,200 technical, maintenance and operational support employees represented by the International Association of Machinists and Aerospace Workers (IAMAW) and the airline's 3,000 pilots represented by the Air Canada Pilots Association (ACPA). The legislation prevented both unions from taking strike action and sent both disputes to a biased arbitration process.

Nature of the Court Challenge

Violation of section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the Charter by denying collective bargaining and the right to strike.

Initiators of the Challenge

IAMAW and ACPA

Current Level of Court

A challenge was filed in March 2012 at the Ontario Superior Court of Justice. The Applicants were in the process of completing their reply record when the Ontario Superior Court rendered a decision in April 2016 related to similar federal back-to-work legislation. In that decision, the Court ruled against the 2011 Restoring Mail Delivery for Canadians

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Act, Bill C-6, and in favour of the unions (see Case # 21, pages 29–30 in [Background: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#)). Based on this ruling, the parties (IAMAW, ACPA and the Attorney General of Canada) decided to place the case in abeyance and attempt to negotiate a settlement. Negotiations are ongoing, but no settlement has been reached at this point.

Union Legal Counsel

IAMAW was represented by Canadian Foundation for Labour Rights board members Paul Cavalluzzo and Adrienne Telford, both with Cavalluzzo Shilton McIntyre & Cornish, and ACPA is represented by Steve Waller of Nelligan O'Brien Payne LLP.

Interveners

Employer side: Air Canada has indicated its intent to seek leave to intervene but has not yet filed its motion materials.

ILO Complaint

A complaint (Case # 2983) was filed by IAMAW in September 2012. The International Labour Organization's (ILO) Committee on Freedom of Association ruled in October 2013 that Bill C-33 violated the ILO's freedom of association principles.

CASE #11

Nova Scotia Essential Health and Community Services Act, Bill 37 (April 2014)

Summary of the Legislation

The Act provides for a broad definition of essential services encompassing some 35,000 public employees who work in a range of occupations, including nursing, hospital support, group home care, home care, ambulance dispatching and paramedic services. It mandates that essential services agreements be negotiated prior to any strike action through a process that is heavily weighted in favour of the employer.

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A union may apply to the Labour Relations Board for arbitration if it feels that the level of employees designated essential is so high that it has the effect of depriving employees of a meaningful right to strike. If arbitration is granted, the Minister of Labour has the right to choose the method. However, whatever method is chosen by the Minister, the independence is undermined, as the arbitrator is forced to consider “the employer’s ability to pay in light of the fiscal position of the government” when making an award.

Note: This legislation is similar to the 2008 Saskatchewan Public Service Essential Services Act which was ruled unconstitutional by the Supreme Court of Canada in January 2015 (see Case # 14, pages 16–19 in [Background: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#)).

Nature of the Court Challenge

Violation of section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the Charter. Bill 37 also violates section 15. It has a discriminatory, adverse impact on employees on the basis of sex, as it disproportionately affects women. Approximately 90% of workers affected by this legislation are women.

Initiators of the Challenge

The Nova Scotia Federation of Labour, the Nova Scotia Government and General Employees Union (NSGEU/NUPGE), the Nova Scotia Nurses’ Union, the Canadian Union of Public Employees and Unifor

Current Level of Court

NSGEU filed a statement of claim on September 12, 2014, with the Supreme Court of Nova Scotia. At the time of writing this edition, the Canadian Foundation for Labour Rights was unable to obtain an update on this case.

Union Legal Counsel

NSGEU/NUPGE is represented by Ray Larkin with Pink Larkin in Halifax.

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Interveners

No interveners at this stage

ILO Complaint

No complaint has been filed.

CLOSED

UPDATE ON CASES BEFORE THE COURTS THAT WERE CLOSED IN 2017

CASE #12

Ontario Putting Students First Act, Bill 115 (September 2012)

Summary of the Legislation

The Act amended the Education Act and required collective agreements between school boards and employees to not include compensation increases for a two-year period beginning September 1, 2012. The legislation also eliminated the accumulation of sick leave credits after August 31, 2012. Bill 115 gives the Minister of Education unprecedented powers, including the right to deny strikes and lockouts and to impose terms in collective agreements at any time.

Nature of Court Challenge

Violation of section 2(d) of the Charter (freedom of association) by denying collective bargaining and the right to strike.

Initiators of the Challenge

The Ontario Secondary School Teachers' Federation (OSSTF), the Elementary Teachers' Federation of Ontario (ETFO), the Canadian Union of Public Employees (CUPE) and the Ontario Public Service Employees Union (OPSEU/NUPGE) have each filed a court challenge.

Current Level of Court

In the January 2017 edition of this publication, it was reported that on April 20, 2016, Justice Thomas Lederer of the Ontario Superior Court ruled Bill 115 unconstitutional because it violates section 2(d) (freedom of association) of the Charter in that it denies educational workers their right to bargain collectively and to strike.

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Details of his decision can be found under Case # 8, pages 7–9 in [Background: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#)

Justice Lederer did not provide a remedy for the parties, but instead instructed them to meet to determine a remedy. The parties agreed and negotiated a remedy in the spring of 2017, which included a payout by the Ontario government of close to \$50 million to the unions that were appellants in the case.

Union Legal Counsel

OSSTF was represented by Susan Ursel, a partner with Ursel Phillips Fellows Hopkinson LLP; ETFO was represented by Steve Barrett, a partner with Sack Goldblatt Mitchell LLP; CUPE was represented by Andrew Lokan, a partner with Paliare Roland Rosenberg Rothstein LLP; and OPSEU was represented by David Wright, a partner with Ryder Wright Blair and Holmes LLP.

Interveners

Employer side: Ontario Public School Boards Association

Union side: Canadian Civil Liberties Association, Unifor

ILO Complaint

A complaint (Case No. 3003) was filed by the Elementary Teachers' Federation of Ontario in January 2013. The International Labour Organization's (ILO) Committee on Freedom of Association ruled in March 2016 that Bill 115 violated the ILO's freedom of association principles.

CASE #13

Federal Expenditure Restraint Act, Bill C-10 (March 2009) and the Public Sector Equitable Compensation Act, also a part of Bill C-10 (March 2009)

Summary of the Legislation

The Expenditure Restraint Act (ERA), as part of the federal government's 2009 Budget Implementation Act, Bill C-10, imposed caps on salary increases for federal government employees, prohibited any additional compensation increases, such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation overrode previously negotiated collective agreements containing wage increases above the imposed salary caps.

The Public Sector Equitable Compensation Act (PSECA), also a part of Bill C-10, removed the right of public sector workers to collectively file complaints for pay equity with the Canadian Human Rights Commission, thereby forcing women to file complaints as individuals. It imposed a \$50,000 fine on any union that encourages members to, or assists them in, filing a pay equity complaint.

Nature of Court Challenge

Both Acts were challenged as being in violation of section 2(d) (freedom of association) of the Charter as they denied federal public service workers their rights to bargain collectively and take strike action. The PSECA was also challenged for being in violation of section 15 (equality rights).

Initiator of the Challenge

There were six separate Charter challenges to this legislation.

Three cases were concluded in 2016: one initiated by the Royal Canadian Mounted police, another by the Association des réalisateurs de Radio-Canada together with the Canadian Union of Public Employees (CUPE) Local 675 and the third by the Association of Justice Counsel.

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In all three cases, the Court ruled in 2016 that Bill C-10 was not a violation of the Charter. Details of these decisions can be found under Cases # 16, # 17 and # 18, pages 20–27 in [Backgrounder: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#).

Current Level of Court

The other three Bill C-10 cases were still opened at the end of 2016, but have now been subsequently closed: one initiated by the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada, another by the Federal Government Dockyard Trades and Labour Council, and the third by the Confédération des syndicats nationaux (CSN)/Union of Canadian Correctional Workers

In each, lower courts ruled against the union challenges. Each union then appealed these decisions to their respective courts of appeal. The appeals were dismissed and the courts found that the federal government bargained in good faith, that the ERA did not impede section 2(d) (freedom of association) and that, even if there had been a breach of Charter rights, any such violation would be saved by section 1 of the Charter.

All three unions then sought leave to appeal at the Supreme Court of Canada in late 2016. Each request was denied.

Details of the lower court decisions can be found under Cases # 10, # 11 and # 12, pages 9–13 in [Backgrounder: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#).

CASE # 14

Manitoba — This is a challenge to Manitoba Hydro’s policy of having employees join a union as a prerequisite for working on major hydroelectric projects.

Summary of the Legislation

Section 76 of the Manitoba *Labour Relations Act* (LRA) provides that all collective agreements must contain a compulsory dues checkoff clause.

Nature of Court Challenge

The plaintiffs argued that the provisions of the collective agreements that create union shops and impose compulsory union dues (“check-offs”) on employees, as well as Manitoba Hydro’s policy of having employees join a union as a prerequisite to working on major hydroelectric projects, are a violation of rights to freedom of expression and association found in sections 2(b) and 2(d) respectively of the Charter.

The plaintiffs’ contention was that the Manitoba Hydro policy was inconsistent with the union selection procedures outlined in section 76 of the LRA and workers were consequently not subject to section 76 obligations regarding the payment of union dues. They sought a court declaration supporting their contention. Alternatively, if the Manitoba Hydro policy were found consistent with section 76 of the LRA, they sought a declaration that the section violated sections 2(b) and 2(d) of the Charter.

Initiators of the Challenge

The Merit Contractors Association of Manitoba (MCAM) with a group of five individual contractors (Barry Millen, Terri Fordham, Rick Lesiuk, Floyd Stoneham and Michel Paul Pilotte).

Current Level of Court

In June 2012, merit contractors filed a lawsuit as a *Charter* challenge with the Manitoba Court of Queen’s Bench against Manitoba Hydro (MH), the Hydro Projects Management Association (HPMA), the Allied Hydro Council (AHC) and the Locals of the International Association of

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Heat and Frost Insulators and Allied Workers, the International Brotherhood of Electrical Workers (IBEW) and the International Union of Operating Engineers (IUOE).

On May 25, 2015, the Court of Queen’s Bench of Manitoba ruled on a challenge from the three unions arguing that the matter was not within the Court’s jurisdiction and that the appropriate jurisdiction was the Labour Board or an arbitrator. Justice Greenberg ruled in favour of the unions, stating that “the Manitoba Labour Board is the proper forum for determination of the issues raised in the plaintiffs’ claim.”

Merit Contractors appealed the decision to the Court of Appeal, which dismissed the appeal with written reasons. Merit Contractors then applied for Leave to Appeal to the Supreme Court of Canada. On February 2, 2016, the court dismissed the application.

Union Legal Counsel

AHC, IBEW Local 2034 and IUOE Local 987 were represented by Tony Marques and Shannon Carson with Myers Weinberg LLP.

MH was represented by in-house counsel Janet Mayor and Odette Fernandes. HPMA was represented by Kristin Gibson, a partner with Aikins Law.

Merit Contractors was represented by management lawyer Peter Gall, a partner with Gall Legge Grant and Munroe LLP.

Interveners

Defendants’ side: The Attorney General of Manitoba

APPENDIX I

SUPREME COURT DECISIONS FOR 2015 - 2016

Details of the following Supreme Court of Canada decisions can be found under Cases # 14, # 15, # 16 and # 19, pages 16–27 in [Background: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#).

Challenge to the Saskatchewan Public Service Essential Services Act, Bill 5 (June 2008) and the Trade Union Amendment Act, Bill 6 (June 2008)

Initiated by the Saskatchewan Federation of Labour (SFL) and several SFL affiliates

Challenge to the Federal Public Sector Labour Relations Act, section 2(1)(d), and to the Royal Canadian Mounted Police Act (Regulations), sections 41 and 96

Initiated by the Mounted Police Association of Ontario and the B.C. Mounted Police Professional Association

Challenge to the federal Expenditure Restraint Act, Bill C-10 (March 2009)

Initiated by Robert Meredith and Brian Roach (on behalf of members of the Royal Canadian Mounted Police)

Challenge to the British Columbia Education Improvement Act, Bill 22 (March 2012)

Initiated by the B.C. Teachers' Federation

For further detailed analysis of these cases, also see the Canadian Foundation of Labour Rights publication, [2015 New Labour Trilogy \(June 2016\)](#)

APPENDIX II

CLOSED CASES BETWEEN 2013 AND 2016

Details of the decisions for each of the following closed cases can be found under Cases # 17 through Case # 31, pages 23–39 in [Backgrounder: Summary of current Charter challenges and their impact on union security in Canada \(December 2016 edition\)](#)

Federal Expenditure Restraint Act, Bill C-10 (March 2009)
Initiated by the Association des réalisateurs de Radio-Canada and Canadian Union of Public Employees (CUPE) Local 675

Federal Expenditure Restraint Act, Bill C-10 (March 2009)
Initiated by the Association of Justice Counsel

Ontario Labour Relations Act (1995)
Initiated by the Society of Energy Professionals, International Federation of Professional and Technical Engineers, Local 160 on behalf of staff lawyers employed at Legal Aid Ontario

Federal Restoring Mail Delivery for Canadians Act, Bill C-6 (June 2011)
Initiated by the Canadian Union of Postal Workers (CUPW)

Federal Act to Amend the Income Tax Act (labour organizations), Bill C-377 (June 2015)
Initiated by the Alberta Union of Provincial Employees

British Columbia Court of Appeal: decision on the Mexico government's claim that its sovereign immunity would be violated if the B.C. Labour Relations Board ruled on a UFCW allegation that Mexico and its consulate in Vancouver colluded with the operators of a B.C. agricultural operation to bust the union
Initiated by the United Food and Commercial Workers Canada Local 1518

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Alberta Public Sector Services Continuation Act, Bill 45 (December 2013),
Public Service Employee Relations Act and the Labour Relations Code
Initiated by the Alberta Union of Provincial Employees (AUPE)
and the United Nurses of Alberta (UNA)

Section of Québec's Anti-Corruption Act, Bill 15 (June 2011)
Initiated by the Canadian Office and Professional Employees
Union

An agreement between the Treasury Board and the Professional Insti-
tute of the Public Service of Canada for disclosure of personal contact
information of all bargaining unit members for purposes of providing
representation, holding strike votes, etc.
Initiated by the Elizabeth Bernard, a Rand 'non-member' of PIPSC

Alberta Personal Information Protection Act
Initiated by the United Food and Commercial Workers Local
401

Ontario Labour Relations Act, non-construction employer provisions
Initiated by the Canadian Union of Skilled Workers (CUSW)

Challenge to the Section of the Québec Labour Code dealing with agri-
cultural workers
Initiated by the United Food and Commercial Workers Canada

New Brunswick: SCC decision in Communications, Energy and Paper-
workers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd. (regard-
ing Irving Oil's random drug testing policy in the workplace
Initiated by the Communications Energy & Paperworkers
Union of Canada Local 30

Québec Act Respecting Conditions of Employment in the Public Sector,
Bill 142 (December 2005)
Initiated by Québec public sector unions representing govern-
ment, education and healthcare staff, including the three la-
bour centrales: CSQ, CSN, FTQ

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OUR GOAL

at the Canadian Labour Institute for Social and Economic Fairness (CLI) is to strengthen Canadian society and contribute to positive social change.

CLI works for:

- the expansion of labour rights for workers and unions
- maintenance of quality public services
- the development of a modern industrial strategy that is environmentally sustainable.

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