

CEC Bulletin

(December, 2009)

The Growing Influence of International Developments on the Canadian Labour Relations System

Recent labour board decisions highlight the increasing influence of international labour principles and standards in Canada. The Supreme Court of Canada has repeatedly considered international labour standards in interpreting the *Charter*, specifically in regard to the right to freedom of association. As referenced in the recent correspondence from the Chair of the CEC, Normand Côté (see membership campaign letter dated December 7, 2009), recent decisions reveal that these standards are now being considered by labour boards and arbitrators in situations beyond direct *Charter* challenges.

The *B.C. Health Services Decision*

A significant development in the reliance on international labour standards came in the Supreme Court of Canada's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (“*B.C. Health Services*”). In January 2002, the British Columbia government introduced legislation to override provisions in collective agreements for health care workers. The Court declared that the legislation was unconstitutional on the grounds that it violated section 2(d) (freedom of association) of the *Charter* as it interfered with the collective bargaining process. For the first time, the Court held that the rights protected under section 2(d) includes a procedural right to collective bargaining.

The importance of international law in the interpretation of *Charter* was one of four reasons provided by the Court for its decision to extend freedom of association to include collective bargaining. The Court stated that Canada's adherence to international documents recognising a right to collective bargaining supports the recognition of the right in section 2(d) of the *Charter*. In particular, the Court considered the *International Convention on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights* and the International Labour Organisation's (“ILO”) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise*. It also provided extensive excerpts from a review by ILO staff of principles concerning collective bargaining.

Recent Labour Board Decisions

The international approach taken by the Supreme Court in *B.C. Health Services* has also begun to influence labour board and arbitration decisions in Canada.

United Food and Commercial Workers Union, Local No. 401 v. Old Dutch Foods Ltd. (“*Old Dutch Foods*”), is a recent decision of the **Alberta** Labour Relations Board (“Alberta Board”) that directly follows the approach taken by the Supreme Court in *B.C. Health Services*. In *Old Dutch Foods*, the Union alleged that the employer had violated Alberta’s *Labour Relations Code* (“*Alberta Code*”) by failing to bargain in good faith due to the employer’s refusal to include a union security (Rand formula) provision in the collective agreement. In addition, the Union alleged that the failure of the *Alberta Code* to require a minimum union security provision akin a Rand formula constituted a violation of section 2(d) of the *Charter*. In both instances, the Alberta Board decided in the Union’s favour.

The primary factor in the Alberta Board’s decision in regard to the constitutional claim was the recognition in Canada, and internationally, of collective bargaining as a fundamental right. Moreover, in light of *B.C. Health Services*, the Alberta Board considered the employer’s refusal to agree to a Rand formula to be a failure to bargain in good faith. This was despite the *Alberta Code*’s omission to include a minimum level of union security and decisions of the Alberta Court of Appeal, which held that the omission did not constitute a violation of section 2(d) of the *Charter*.

Communications, Energy and Paperworkers Union of Canada v. Bell Mobility Inc. (“*Bell Mobility*”) is a recent decision of the **Canada** Industrial Relations Board (“Board”) in which the Board directly considered an international labour convention in its decision. In *Bell Mobility*, the Union filed a complaint with the Board, which alleged that the employer had been engaging in unfair labour practices during an organising campaign, and applied for an interim order that would allow it to carry on its campaign while the complaint was being resolved.

The Board’s decision entailed a determination of the appropriate practical steps to take, in light of the objectives of the federal *Canada Labour Code* (“*Code*”). In determining the objectives of the *Code*, the Board began by noting that Canada had ratified the ILO’s *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise*, and that the convention provided a right to collective bargain long before the enactment of the *Charter*. The Board, therefore, ultimately imposed a set of directions that allowed the Union to continue its organising campaign.

Conclusion

Employers should be aware of the extent to which developments in the international arena are impacting, not just judicial decisions at the highest level in Canada but also, everyday labour board and arbitration decisions.

Employers are well-advised to remain attentive to and involved in international developments. It is too late to wait for the domestic hearing before a labour board or an arbitrator. Employers need to influence the course of developments at the source — that is, at the international level — before they wash ashore.

The CEC is the “voice” of Canadian business on the international stage in respect of social/labour and employment matters.