



Canadian Centre for
Policy Alternatives
Manitoba Office

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Labour and the Charter of Rights and Freedoms: 35 Years of Experience

In April 1982 the *Constitution Act* was proclaimed. It included the Charter of Rights and Freedoms.

The Charter protects Canadians' political and civil rights. It enumerates a range of fundamental freedoms, including freedom of association, religion and the press. It also guarantees certain democratic rights, such as the right to vote, mobility rights, legal, equality and language rights.

All laws passed must respect these rights, the only limitation being that set out in Section 1 of the Charter, which stipulates that all these rights and freedoms "...are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The early years of the Charter coincided with economic challenges in Canada, and legislative attacks on trade union rights. Workers looked to the Charter for protection, in particular to the rights to freedom of association (section 2 d), freedom of life, liberty and security of the person (section 7), and equal treatment before the law (section 15).

In 1987 three Supreme Court decisions, known as the labour trilogy—involving the right to strike, opposition to legislated wage controls, and back to work legislation—went against labour, and the Charter was widely viewed as hostile to collective worker rights.

This trend continued until 2007 when the BC Health Services decision overturned a provision of BC legislation that had unilaterally amended freely negotiated collective agreements.

A coalition of BC health care unions successfully established through a legal challenge that

the Charter's freedom of association and equality provisions prohibited such legislation. The Supreme Court decision affirmed the primacy of collective bargaining on workplace issues, and the validity of freely negotiated collective agreements.

The court applied a two-fold test: the importance of rights that the legislation removed; and the manner in which the legislation was adopted.

BC Health Services was a major victory for labour. It affirmed the constitutional right to engage in bargaining, and to expect respect for provisions bargained.

Since BC Health Services in 2007 there have been further important Supreme Court decisions.

One involved the court striking down as unconstitutional, laws that prevented RCMP officers from unionizing. A second struck down Saskatchewan public sector essential services legislation, which effectively prevented union members from striking.

These were additional victories for Canada's labour movement, because they affirmed the constitutional right to join a union and the right to strike, and to have a fair process to achieve a collective agreement.

Most recently, in 2016, after over a decade of legal dispute, the Supreme Court struck down BC legislation that had altered provisions of teachers' collective agreements, and prohibited bargaining on class size.

Building upon the BC Health Services decision, the Court reaffirmed the obligation of governments, prior to acting unilaterally to change a contract, to give unions the

205 - 765 Main St.

Winnipeg, MB

R2W 3N5

204-927-3207

lynne@policyalternatives.ca

www.policyalternatives.ca

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ERROL BLACK CHAIR

EBC

IN LABOUR ISSUES

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opportunity to influence changes through consultation and collective bargaining.

The Supreme Court has not guaranteed workers any particular result. But it has affirmed the right of workers to engage in meaningful collective bargaining, and it has struck down heavy-handed actions of governments that have not consulted or engaged in such bargaining.

Manitoba may be the next jurisdiction to end up before the Supreme Court, regarding the provincial Conservative government's adoption of Bill 28, *The Public Services Sustainability Act*.

Bill 28, which has yet to be proclaimed, legislates four year deals with 0%; 0%; 0.5% and 1% wage adjustments. It is patterned after similar legislation introduced in Nova Scotia in 2015, which is also the subject of a legal challenge.

There was no meaningful consultation with Manitoba labour prior to the enactment of Bill 28, nor was this something the Conservatives campaigned on in the 2016 election.

Of note is that the MFL contracted with the former head of the University of Manitoba's Asper Business School. He presented evidence that the provincial economy was *not* in freefall, and in fact the Province's finances would be back in balance within the eight year time frame that government themselves had talked of in the election campaign. In short, there was no financial crisis.

The Partnership to Defend Public Services, formed by the MFL, has launched a constitutional challenge to Bill 28. The coalition argues that collective bargaining rights are charter-protected, and they are being violated by the provincial Conservative government.

Because Charter challenges can take years to resolve, six of the 28 plaintiff unions have filed an application for an injunction, asking the court to prohibit the government from proclaiming the *Act* into force, at least until its constitutional validity can be determined by the courts. The injunction will be heard by the Court of Queen's Bench in May 2018.

The six unions have agreed that any negotiated increases to wages or benefits will be held in abeyance pending the result of the constitutional challenge.

It remains to be seen if Manitoba's Bill 28 will result in further rulings by the Supreme Court. What is clear, however, is that 35 years into the Charter era, labour rights in Canada are dynamic and ever evolving.

Manitoba workers have banded together to challenge this latest attack on their collective bargaining rights. Their efforts will not only support Manitoba workers, but those of all Canadians as well.

(This article prepared by Paul Moist: CCPA-MB Research Associate and Chair of the EBC on Labour Issues)

Garth Smorang was the keynote speaker at the annual Errol Black Chair in Labour Issues Brunch, November 28, 2017. Smorang, along with a team from Myers Weinberg LLP, are counsel for the MFL-led coalition of unions that is leading the legal challenge to Bill 28, [The Public Services Sustainability Act](#), which attacks free collective bargaining rights.

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References available upon request.