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The Supreme Court's New Constitutional Decisions and the Rights of Farm Workers in Alberta

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Cases Commented On: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII); *Meredith v Canada (Attorney General)*, 2015 SCC 2 (CanLII); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII); *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII)

As I was saying to my constitutional law students the other day, the first few weeks of 2015 have been remarkable for the sheer number of *Charter* decisions released by the Supreme Court of Canada, including several that have overturned previous decisions in important ways. Of the eight SCC decisions released to date in 2015, five are major *Charter* rulings. Several of these decisions have implications for a project on the rights of farm workers that I worked on with a group of constitutional clinical students in the winter of 2014. The students' posts on the constitutionality of excluding farm workers from labour and employment legislation are available here, here, here and here. In this post, I will outline the impact these recent *Charter* decisions have on the students' arguments. In a nutshell, they make the claims of farm workers for legislative protection even stronger, refuting the argument of Premier Jim Prentice that we need "more research and debate" before taking action on these unconstitutional exclusions.

The Decisions

In the first decision relevant to farm workers, *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, the Court built on its earlier ruling in *Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, where the majority had found that section 2(d) of the *Charter* protects collective bargaining. In *Mounted Police*, the majority reasons by McLachlin CJ and LeBel J found that the exclusion of RCMP members from federal collective bargaining legislation violated section 2(d) of the *Charter*, overruling the Court's earlier decision in *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989.

The majority defined freedom of association to contain constitutive, derivative and purposive elements. The *constitutive* formulation of section 2(d) is the narrowest, and protects the freedom to belong to or form an association (at para 52); the *derivative* element protects associational activities that relate to other constitutional freedoms (at para 53); and the *purposive* approach adds the protection of collective activities that enable "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their

interests interact and, perhaps, conflict" (at para 54, citing the dissenting judgment of Dickson CJ in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 366). The purposive approach dictates the protection of a meaningful process of collective bargaining, which includes elements of choice (i.e. input into the selection of collective goals) and independence (i.e. autonomy from managerial power) (at paras 81-83). The majority also affirmed that the test for a violation of section 2(d) is one of substantial interference with associational activities, not the "impossibility" of achieving workplace goals (at paras 74-75, clarifying its decision in *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 (which had used the language of "impossibility")).

Applying these principles, the majority held that the regime imposed on RCMP members interfered with a meaningful process of collective bargaining, in violation of section 2(d) of the *Charter*. This was not a case involving "a complete denial of the constitutional right to associate" (at para 105), since RCMP members did have some ability to put forward workplace concerns via a Staff Relations Representative Program (SRPP). However, the SRPP was an organization that RCMP members "did not choose and [did] not control", and it "lack[ed] independence from management", leaving members "in a disadvantaged, vulnerable position", thus amounting to substantial interference with their collective bargaining rights (at para 106). This violation could not be justified under section 1 of the *Charter,* as the government's objectives – "to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective" – was not rationally connected to a separate labour relations regime (at paras 142, 143-153). The Court struck down the impugned provisions of the relevant legislation, noting however that it was not mandating a specific labour relations regime for the RCMP, such as inclusion with other public sector workers in the *Public Service Labour Relations Act*, SC 2003, c 22 – "Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*" (at para 156).

In the second relevant decision, *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, a majority of the Court found that the right to strike was guaranteed under section 2(d) of the *Charter*. This decision was long-awaited by the labour rights movement, though it was foreshadowed in *Mounted Police*, where the majority noted the importance of "recourse to collective action by employees" (at para 72). The majority in *Saskatchewan Federation of Labour* affirmed the goals underlying freedom of association: "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" (at para 53, quoting *Health Services* at para 81), and found that the right to strike was "essential to realizing these values and objectives" (at para 54). This finding was said to be supported by international law, including guarantees of the right to strike in article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3; article 45(1) of the *Charter of the Organization of American States*, Can TS 1990 No 23; and ILO *Convention No. 87 concerning freedom of association and protection of the right to organize,* as interpreted by the Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (1994) (at paras 65-67). The majority also recognized "an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike" (at para 71), citing case law from the European Court of Human Rights, and case law and constitutional protections in Germany, Israel, France, Italy, Portugal Spain, and South Africa (at paras 72-74).

On the basis of these principles, the majority found that Saskatchewan's *Public Service Essential Services Act*, SS 2008, c P-42.2 [*PSESA*], substantially interfered with section 2(d) of the

Charter because it denied workers designated as "essential" the ability to participate in any work stoppages (at para 78). Importantly, the Court recognized that the availability of alternative dispute resolution mechanisms as an alternative for addressing the breakdown of collective bargaining were relevant to the justification analysis under section 1 of the *Charter* rather than to whether there was a violation of section 2(d). In this case, the government could not meet its burden under section 1 because the *PSESA* failed the minimal impairment test by unilaterally authorizing public employers to designate workers as "essential" with no adequate review mechanism and no meaningful dispute resolution mechanism (at para 81). The *PSESA* was declared unconstitutional, with the declaration suspended for one year (para 103).

The third decision relevant to farm workers is *Carter v Canada (Attorney General)*, 2015 SCC 5, which I blogged on here. The key points to reiterate from *Carter* are that the right to life under section 7 of the *Charter* protects individuals from government actions that increase the risk of death directly or indirectly (at para 62), and the right to security of the person protects against state actions that cause physical or serious psychological suffering (at para 64).

Significance of the Decisions for Farm Workers

These decisions are important in several ways to the claims of Alberta farm workers that their exclusion from labour and employment legislation violates the *Charter*.

First, the argument that the exclusion of farm workers from the *Labour Relations Code*, RSA 2000, c L-1, violates section 2(d) of the *Charter* is strengthened. *Mounted Police* affirmed an expansive definition of freedom of association, with constitutive, derivative and purposive elements. Moreover, while *Fraser* had suggested that the test for a violation of section 2(d) may have changed from "substantial interference" to the "impossibility" of achieving workplace goals, the Court clarified in *Mounted Police* that the test remains one of substantial interference. In the case of farm workers, their exclusion from the *Labour Relations Code* fails to accord them even the narrowest level of protection under section 2(d), the constitutive freedom to belong to or form an association. The exclusion thus substantially interferes with their freedom of association. This conclusion is supported by international law and comparative law, and the Court's decision in *Saskatchewan Federation of Labour* supports the reliance on a broad range of sources in this regard. *Mounted Police* and *Saskatchewan Federation of Labour* also support the conclusion that the complete exclusion of farm workers from Alberta's labour relations regime could not be justified under section 1 of the *Charter*. However, farm workers must be aware that both cases allow for the possibility of specialized labour relations regimes for certain types of workers, consistent with the Court's decision in *Fraser* (upholding a specialized labour regime for farm workers in Ontario).

Second, the argument that the exclusion of farm workers from the *Employment Standards Code*, RSA 2000, c E-9, *Occupational Health and Safety Act*, RSA 2000, c O-2, and *Workers' Compensation Act,* RSA 2000 c W-15 violates section 7 of the *Charter* is affirmed by *Carter*. The exclusion of farm workers from these protective benefit regimes makes their working conditions more dangerous or their post-accident health more precarious, thus increasing the risk of death or serious bodily harm, and the exclusions therefore violate the rights to life and security of the person. The section 7 claims remain novel, as there are few Supreme Court decisions involving the rights to life and security of the person in the context of labour and employment legislation, and the Court has shown reluctance to protect economic rights under section 7 and to apply it outside the adjudicative context. For example, in *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 at paras 80-83, a majority of the Court found that section 7

does not protect the right to a particular level of social assistance adequate to meet basic needs. On the other hand, in *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35, three out of seven justices applied section 7 outside the adjudicative context, finding that Quebec's legislative prohibition on private health insurance violated the rights to life and security of the person. Based on *Carter*, and provided that a sufficient causal connection can be shown between the exclusions and the increased risks to farm worker health and safety, violations of the rights to life and security of the person could be established. And, as noted in the students' earlier posts, there are strong arguments that these violations are also contrary to the principles of fundamental justice under section 7 for being arbitrary, overbroad, and grossly disproportionate.

A third point of note is that none of the decisions blogged on here included findings that the impugned legislation or government actions violated section 15, the *Charter*'s equality guarantee. That claim was made but not ruled on in *Carter* (see here), but discrimination claims were not advanced in the labour rights decisions, even though the laws in those cases targeted particular groups of workers. This is likely because the Court has not been receptive to section 15 arguments in the workers' rights context in the past. The Court rejected a section 15 claim brought by RCMP members in *Delisle*, avoided ruling on a similar claim brought by farm workers in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 (relying on a violation of section 2(d) of the *Charter* instead), and, by a majority, rejected such a claim by farm workers in *Fraser*. It is interesting to note that the decisions in *Mounted Police* and *Saskatchewan Federation of Labour* are steeped in language about the vulnerability, disempowerment and inequality of workers in the context of freedom of association, even in the case of workers who are relatively privileged compared to farm workers. However, the Court has still shown a reluctance to protect occupational status as an analogous ground under section 15, even in the case of more limited forms of occupational status such as being a farm worker. Perhaps the decisions in *Mounted Police* and *Saskatchewan Federation of Labour* will facilitate equality claims in future cases, but at present, the potential success of section 15 claims by farm workers remains uncertain.

Concluding Thoughts on a Fourth Case

On the same day that it released *Mounted Police,* the Court handed down *Meredith v Canada (Attorney General)*, 2015 SCC 2, which stands as a contrast to the other decisions discussed in this post. In *Meredith*, the majority applied its test from *Mounted Police* to a different scenario facing RCMP members – the unilateral rollback of wage increases by the Treasury Board and via the *Expenditure Restraint Act*, SC 2009, c 2 (*ERA*) following the global financial crisis in 2008. Writing for the majority once again, McLachlin CJ and LeBel J noted that while section 2(d) of the *Charter* protects the right to meaningful collective bargaining, it does not guarantee a specific outcome (at para 25). In this case, the RCMP's collective bargaining regime had been found unconstitutional in *Mounted Police*, but the majority indicated that the process for wage negotiations – a Pay Council – still "attract[ed] scrutiny" under section 2(d). I find this part of the judgment rather confusing, so I will set out the Court's reasoning in full (at para 25):

> [T]he record here establishes that, in the absence of a true collective bargaining process, RCMP members used the Pay Council to advance their compensation-related goals. In our view, the *Charter* protects that associational activity, even though the process does not provide all that the *Charter* requires. The legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(*d*). Accordingly, we

> must examine whether the *ERA* substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association.

It is difficult to understand how government action that interferes with a "constitutionally inadequate process" would not only "attract scrutiny" under the *Charter*, but would itself be tainted by the same constitutional inadequacy. Here we have not only a constitutionally inadequate wage negotiation process, but also an interference with that process in the form of unilateral rollbacks. One would have thought that the federal government's unilateral actions – which clearly attract scrutiny under section 32 of the *Charter*, as the *Charter* applies to actions of the executive and legislative branches – would have compounded the violation of freedom of association, but that the government could nevertheless attempt to justify its actions under section 1 of the *Charter* based on the specific context at hand. In *Meredith*, however, the majority found that the federal government's interference with the constitutionally inadequate bargaining process did not violate section 2(d). It noted that the wage roll-backs over 2008, 2009 and 2010 were "consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration" and "did not preclude consultation on other compensation-related issues, either in the past or the future" (at para 28). With respect, these are considerations that are relevant to justification under section 1 of the *Charter*, not whether there was a *Charter* violation. As noted by Justice Abella in dissent (at para 62):

> The unilateral rollback of three years of agreed-upon wage increases without any prior consultation is self-evidently a substantial interference with the bargaining process… The fact that the rollbacks were limited to a three-year period does not attenuate the key fact that they were unilateral. Nor does the fact that consultation was possible on other more minor compensation issues minimize the severity of the breach.

She was of the view that this violation of section 2(d) could not be saved by section 1, as the government's fiscal restraint objectives "[did] *not give the government an unrestricted licence in how it deals with the economic interests of its employees" (at para 65). This was particularly so since the government consulted with "*almost every other bargaining agent in the core public service" (at para 71).

Interestingly, neither the majority or dissenting opinions (nor the concurring opinion by Rothstein J) cite the Court's earlier decision in *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381, 2004 SCC 66, where the Court unanimously upheld the cancellation of pay equity payments under section 1 of the *Charter* based on a "fiscal crisis" in spite of the discriminatory impact of that action on female workers. *NAPE* has been widely criticized (see e.g. the alternative judgment of the Women's Court of Canada here), but the majority in *Meredith* went even further by failing to find a breach of section 2(d) in the case of unilateral wage rollbacks implemented without any consultation.

Meredith sounds a cautionary note in the midst of the Court's other, more expansive rulings on section 2(d) of the *Charter*. In my opinion, the majority in *Meredith* should have taken heed of a compelling line from Justice Abella's reasons in *Saskatchewan Federation of Labour* (at para 76)*:* "If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?" As it stands, the Court's affirmation of the constitutionality of unilateral wage rollbacks in a time of fiscal constraint may be a little too close to home for some of us in this province.

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