SCC No. 40123

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUÉBEC)

B E T W E E N :

SOCIÉTÉ DES CASINOS DU QUÉBEC INC.

Appellant

- and -

ASSOCIATION DES CADRES DE LA SOCIÉTÉ DES CASINOS DU QUÉBEC

Respondent

(style of cause continued on next pages)

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PARTS I & II - OVERVIEW AND POSITION

1. In this case, the Court must determine whether s. 1(1) of the *Labour Code* (the *Code*)[1] violates section 2(d) of the *Charter of Rights and Freedoms* (the *Charter*)[2] in excluding from its scope any person who "is employed as manager, superintendent, foreman or representative of the employer."

2. This Court has always looked to applicable principles of international human rights law for guidance in interpreting the *Charter*. Specifically, the Court has adopted a principle that the *Charter* is presumed to conform with Canada's international human rights obligations.

3. What is distinct in this case, is the presence of an international treaty body's decision and recommendations on the same domestic legislation under consideration by the Court. Determining the persuasive value of an international treaty body's decision in a *Charter* analysis is a novel and important question for the Court to consider in this case.

4. The Canadian Lawyers Association for International Human Rights (CLAIHR) submits that, under international laws binding on Canada, managerial employees have the right to collective bargaining. CLAIHR further submits that given the impartial, specialized, and quasi-judicial nature of the treaty body in question, this Court should accept its finding that there has been a breach of the right to freedom association and to collective bargaining under international law, thus giving rise to a presumption that there has also been a breach of the *Charter* as well.

5. CLAIHR takes no position on any other question at issue in this appeal.

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[1] *Labour Code*, CQLR c C-27.
[2] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

PART III - STATEMENT OF ARGUMENT

A. International treaties and conventions that have been signed and ratified by Canada are an authoritative source and persuasive interpretive tool for the Charter and in Canadian domestic law

6. International human rights law shares a close relationship with the *Charter*. The drafting of the *Charter* itself drew strong influence and inspiration from the Universal Declaration of Human Rights.[3]

7. As such, international human rights law has always had a special role to play in *Charter* interpretation. Since this Court's decision in *Slaight Communications v. Davidson* (*Slaight Communications*), it has been a principle of *Charter* interpretation that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[4] Following *Slaight Communications*, the presumption of conformity has guided the Court in many *Charter* cases, including with respect to the right to freely associate, the right to collective bargaining, and the right to strike under s. 2(d).[5]

8. The present case has a special connection to international law, in that an international tribunal has already considered and issued a decision on this issue pursuant to Canada's international obligations.[6] Although this is an atypical situation, it is hardly unique. It is a

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[3] See William A. Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights", 1998 43-3 McGill Law Journal 403, 1998 CanLIIDocs 40 at 405-406; M. Cohen & A.F. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265; J.E. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 Supreme Court L. Rev. 287.
[4] *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC)
[5] See *Saskatchewan Federation of Labour*, 2015 SCC 4 at paras 62-75; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at paras 91-95; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at paras 57-72; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 71; *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016 at paras 16, 27; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia (BC Health Services)*, 2007 SCC 27 at paras 69-79.
[6] Case No. 2257, Report No. 335 (ILO), Vol. LXXXVII, 2004, Series B, No. 3 [Appeal Record, Volume V, Tab 108 at p 148].

growing trend for Canadian human rights claimants to make use of both domestic and international adjudicative procedures, as is common in many other countries.

9. In these situations, the question arises as to the precise interplay between the decision of the international tribunal and domestic law. For example, one claim currently being litigated in Ontario courts, *Toussaint v. Canada (Attorney General)*,[7] raises this question squarely. In that case, the claimant argues that a decision of an international tribunal has independent legal relevance domestically, not just under the *Charter* but under administrative law and common law as well. At present, Canadian jurisprudence offers little guidance on this question.

10. This Court cautioned in *Quebec (Attorney General) v. 9147-0732 Québec inc.* (*9147-0732 Québec inc*.) that care should be taken to distinguish between different sources of international law and their status relative to Canada in determining their relevance to *Charter* interpretation.[8] Specifically, only international instruments that have been ratified by Canada are binding on Canada under international law, and are thus capable of engaging the presumption of conformity. A further relevant distinction exists between instruments that pre-date and post-date the *Charter*, as the former "form part of the historical context of a *Charter* right and illuminate the way it was framed."[9]

11. The decision in *9147-0732 Québec inc*. represents an attempt to establish an analytically rigorous framework for the interplay between international law and *Charter* interpretation. Despite this laudable initiative, the case does not provide guidance for a situation such as this where a competent international tribunal has already pronounced on the matter directly at issue under international law. The matter at hand presents an opportunity for this Court to squarely address that question.

12. CLAIHR submits that, where a competent and impartial international tribunal with specialized expertise, through a rigorous quasi-judicial process, has considered and issued an opinion directly on the issue in question, with respect to Canada's international human

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[7] *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747 (CanLII)
[8] *Quebec (Attorney General) v. 9147-0732 Québec inc.*,, 2020 SCC 32 (*9147-0732 Québec inc.*)
[9] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (*9147-0732 Québec inc.*) at paras. 30-42.

rights obligations, then a Canadian court should give substantial deference to that tribunal's opinion in determining whether the presumption of the *Charter*'s conformity with Canada's international human rights obligations is engaged.

B. Several international law instruments signed and ratified by Canada guarantee the right to collective bargaining

13. Following this Court's guidance in *9147-0732 Québec inc.*, the analysis must begin by clearly identifying the relevant international legal norms and whether they are binding on Canada. In this respect, there are several international instruments pertaining to the right to freedom of association and to collective bargaining under international law that have been ratified by Canada. These are summarized at paras. 94-100 of the decision of the court[10] below and include: Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR);[11] Article 8 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR);[12] Article 2 of the *Freedom of Association and Protection of the Right to Organize Convention* (ILO Convention No. 87);[13] and Article 2 of the *Right to Organize and Collective Bargaining Convention* (ILO Convention No. 98).[14]

14. It is also well established that, under international law, the right to freedom of association encompasses the right to collective bargaining. International law principles have, in turn, guided the development of the right to collective bargaining under the *Charter*. As each of the international instruments noted above pre-date the *Charter*, it follows that these international laws "form part of the historical context" of the *Charter* and illuminate the way that s. 2(d) was framed.[15]

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[10] *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (CanLII) at paras 94-100.
[11] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).
[12] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976).
[13] *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize*, 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950, ratified by Canada in 1972).
[14] *Right to Organize and Collective Bargaining Convention*, 1949, (No. 98), 96 UNTS 257.
[15] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (*9147-0732 Québec inc.*) at paras. 30-42.

15. The International Labour Organization (ILO), and its various organs and agencies, has been the most active international authority in developing and elaborating on the right to collective bargaining under international law. The ILO is responsible for the elaboration of international legal standards on global rights, primarily through the development of a series of multilateral conventions. The ILO convenes representatives from governments, employers, and workers' organizations from member states to negotiate and draft multilateral conventions on various aspects of labour rights, which are then signed and ratified by member states. The ILO also has various adjudicative bodies that monitor and support member states' compliance with these conventions.

16. In particular, the ILO's Committee on Freedom of Association (CFA) receives and considers complaints against states alleging infringements of the right to freedom of association in the labour context. Established in 1951, the CFA is composed of 18 members drawn from government, worker, and employer representatives of the ILO. In its first 65 years, the CFA considered over 3,200 complaints, and has built a detailed and coherent set of principles on freedom of association and collective bargaining under the ILO Constitution and under ILO conventions, recommendations, and resolutions.[16] Although the CFA's decisions are not binding under international law, they carry significant persuasive authority based on its specialized, tripartite, and experienced composition which achieves balance through a consensus-based decision-making process.

17. In *Saskatchewan Federation of Labour v. Saskatchewan* (*Saskatchewan Federation of Labour*), this Court stated that "Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court."[17] This Court has also followed the CFA's guidance in *Ontario (Attorney General) v. Fraser* (*Fraser*)[18] and *Health Services and*

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[16] International Labour Office, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, 6th edition* (Geneva: ILO, 2018) at 1-3, 305-19.
[17] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras. 67-69.
[18] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII) at para 94.

Support - Facilities Subsector Bargaining Assn. v. British Columbia (*BC Health Services*).[19]

18. On the right of managerial employees to organize, the CFA states that "It is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers."[20] Crucially, however, two conditions must be met for such a denial to comply with ILO Convention No. 87. First, such workers must have the right to form their own associations to defend their interests, and second, the categories of such staff must not be defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership.[21]

19. Another committee of the ILO, the Committee of Experts on the Application of Conventions and Recommendations ("CEACR"), provides comments to the ILO on measures taken by member states to implement ratified conventions. It is composed of 20 distinguished jurists, including retired judges and legal academics.[22] Like the CFA, its opinions are not legally binding, but carry substantial persuasive weight owing to its impartiality and expertise. As with the CFA, this Court has followed the CEACR's guidance in cases related to s. 2(d) of the *Charter*.[23] In *BC Health Services*, the Court referred to the jurisprudence of the CEACR and the CFA as the "cornerstone of the international law on trade union freedom and collective bargaining."[24]

20. Like the CFA, the CEACR agrees that managerial employees have the fundamental right to collective bargaining under international labour law. They may be excluded from

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[19] *BC Health Services*, 2007 SCC 27 at para 76.
[20] International Labour Office, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, 6th edition* (Geneva: ILO, 2018) at para 381.
[21] International Labour Office, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, 6th edition* (Geneva: ILO, 2018) at para 381.
[22] International Labour Office, *Application of International Labour Standards 2023: Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: ILO, 2023) at 36-37.
[23] *Saskatchewan Federation of Labour*, 2015 SCC 4 at para 67, *Fraser*, 2011 SCC 20 at para 95
[24] *BC Health Services*, 2007 SCC 27 at para 76.

joining trade unions with other workers, but must have the right to form their own associations instead.[25]

21. With respect to the question of managerial employees' right to organize in an association for the purposes of collective bargaining, the CEACR emphasizes that "Article 2 of Convention No. 87 makes no distinction based on the nature of the functions or the hierarchical level of workers, who should all enjoy the right to organize, including managerial and executive staff."[26]

22. In summary, what emerges from an examination of the jurisprudence of the most authoritative international bodies with respect to the right to organize and collectively bargain, is that under international labour law, managerial employees do enjoy a right to organize. They can be excluded from joining trade unions with other employees, but only if they are given the right to form their own associations to defend their interests instead. There is otherwise "no distinction" between the right to organize as enjoyed by managerial and non-managerial employees under international law.

C. The CFA's finding under international law should receive substantial deference from the Court

23. The preceding authorities demonstrate that under international law, managerial employees have the same right to organize as non-managerial employees. While managerial employees may be barred from joining unions with other employees, managers have the right to form their own associations to defend their particular interests.

24. In the normal course, the Court would apply these principles to the facts at hand to assess what Canada's international obligations entail in the present case. This exercise would then determine whether the presumption of conformity is engaged.

25. In this case, however, there is the additional factor that the issue at hand has already come before an international tribunal, which has issued an opinion. As noted above, Canadian

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[25] International Labour Office, *Freedom of Association and Collective Bargaining* (Geneva: ILO, 1994) at para. 66.
[26] Ibid.

litigants are increasingly making use of adjudicative procedures of international tribunals to assert human rights claims that ultimately also find their way to Canadian courts. As such, it behooves the Court to enunciate some guidance on how much weight their decisions should receive in Canadian courts. In this respect, CLAIHR submits that Canadian courts should show the decisions of such tribunals a high degree of deference in their determinations on questions of international law that fall within their ambit.

26. The international community of states has no legislative body empowered to impose laws from the top down. Instead, international "law-making" often proceeds by way of large multilateral agreements. If enough countries sign on to a multilateral agreement and consent to be legally bound by it, it achieves effectively the same status as a universally applicable "law."

27. Such is the process through which much international human rights law comes into being - through large multilateral agreements purporting to enunciate universal values on specific themes, to which individual countries must consent to be bound. The ICCPR and ICESCR are two such conventions, but other important agreements include the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Racial Discrimination (CERD), and the Convention on the Elimination of Discrimination Against Women (CEDAW).

28. Many of these international human rights instruments also have associated adjudicative bodies that are often empowered to receive and consider complaints against member states from individuals alleging that their rights have been violated. For instance, the UN Human Rights Committee is the designated body empowered to receive and consider complaints from individuals who believe that their rights under the ICCPR have been violated by states that have agreed to the Committee's jurisdiction. The ICESCR, CRC, CERD, and CEDAW also all have their own adjudicative treaty bodies that are similarly empowered to receive individual complaints, as do many other treaties.

29. Where there is a question of international law that is relevant to a question of domestic law, Canadian courts should always have the final word on what the answer to that question is from the perspective of Canadian law. Our country's constitutional structure

requires no less. However, as is the case in administrative law, the Court ought to provide a high degree of deference to the findings of specialized, impartial tribunals that conduct quasi-judicial procedures and issue opinions within their topic of expertise.

30. The CFA is an independent tripartite body composed of nine regular members representing in equal proportion Government, Employer and Worker groups.[27] Through its complaints procedure the CFA has built up an extensive body of jurisprudence on the right to freedom of association and collective bargaining under international law.[28] Its procedures are fair and transparent, accepting formal submissions from both sides to a dispute and issuing well-reasoned opinions. As such, its findings should attract substantial deference from Canadian courts.

31. As part of its consideration of whether s. 1(1) of the *Code* violated Canada's international obligations in relation to freedom of association, the CFA engaged in a rigorous analysis of ILO Convention 87 and 98. It also referenced the Court's consideration of international law vis-à-vis the *Charter* in *Dunmore v. Ontario (Attorney General)*, where the Court stated that "the notion that underinclusion can infringe freedom of association is not only implied by Canadian *Charter* jurisprudence, but is also consistent with international human rights law."[29]

32. The CFA ultimately made the following determinations:

    a. That although the complainant managerial employees' associations do enjoy a real form of recognition, this recognition does have deficiencies which cause it to fall short of compliance with Canada's obligations under ILO Conventions Nos. 87 and 98;

    b. that these deficiencies relate chiefly to the precariousness and uncertainty of contractual arrangements that are not enshrined in a legislative text; the lack of access to conventional mechanisms for collective bargaining and the settlement of

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[27] International Labour Office, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, 6th edition* (Geneva: ILO, 2018) at Annex I, at para 7.
[28] International Labour Office, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association, 6th edition* (Geneva: ILO, 2018) at Annex I, at para 1-75.
[29] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII) at para 27.

collective disputes such as conciliation, arbitration, and the right to strike; and the absence of measures to adequately protect against acts of employer domination and interference that would otherwise violate labour legislation;

c. that in order to remedy this lack of compliance with international labour law, the government must amend the existing labour relations regime to allow managerial employees to "form associations that enjoy the same rights, prerogatives and means of redress as other workers' associations."[30]

33. Absent a compelling reason otherwise, CLAIHR respectfully submits that this Court should accept the findings of CFA with respect to Canada's obligations under the applicable international labour law, and proceed under the presumption that the *Charter* affords the same minimum level of protection.

PARTS IV & V - COSTS AND ORDER REQUESTED

34. CLAIHR does not request any particular order, but ask that no costs be awarded for or against CLAIHR regardless of the disposition of the appeal.

[30] Case No. 2257, Report No. 335 (ILO), Vol. LXXXVII, 2004, Series B, No. 3 [Appeal Record, Volume V, Tab 108 at p 148] at paras. 463-67.

DATED at the City of Toronto, Province of Ontario, this 27th day of March, 2023.

SIGNED BY

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