

Features Labour Relations Legal

In the absence of the right to strike, fashion may be a form of constitutionally protected 'expression'

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Two Montreal police cars parked in front of a local station. Photo: Adobe Stock

In Canada, some unionized employees are prohibited from striking under provincial labour laws often referred to as essential services legislation. This includes certain first responders, such as police officers.[1] With the right to strike out of the question, some of these employees have tried other means to raise awareness of ongoing labour issues.

Since the mid-1970's in Quebec, for example, police officers have worn jeans, baseball caps, cowboy hats, and most recently, camouflage pants and red caps, while on-duty, to collectively protest ongoing government changes to pensions and wages.[2] The act of donning a red cap and camo pants has become a cultural staple within Quebec's first responders even making an appearance on Quebec television.[3]

The question recently answered by the Superior Court of Quebec is, 'if a government passes a law prohibiting a peace officer from altering any part of their standard issued uniform, is this a violation of the officer's constitutionally protected freedom of expression or association?' The court's answer – 'yes.'

What happened?

In 2017, the government of Quebec introduced Law 20 prohibiting a police officer or special constable from substituting or altering any element of their standard issued uniform, with monetary fines as high as \$3,000 per day, for a violation.[4]

Several public sector unions challenged Law 20 as a violation of their members' rights to freedom of expression and freedom of association under the *Canadian Charter of Rights and Freedoms* (the "Charter") and the *Quebec Charter of Rights and Freedoms*.

In defense of the law, the Attorney General of Quebec ("PGQ") argued two things:

1. Wearing a uniform is not a right, but a privilege linked to the exercise of public authority; and a member of the public must be able to properly identify a police officer on patrol, and
2. Preventing a police officer from altering their uniform does not limit their ability to express their concerns or their right to associate.

The PGQ also argued that even if Law 20 violated the rights of members, the law could be justified as a reasonable limit under section 1 of the *Charter* because:

1. The law had a pressing and substantial objective,
2. The effect of the law was rationally connected to that objective,
3. The law minimally impaired the rights of the affected individuals, and
4. The law's benefit outweighed its detrimental impact on the rights of the individual.

Law 20 found to be unconstitutional

On Aug. 30, 2023, the Superior Court of Quebec struck down Law 20 as unconstitutional, rejecting each of the PGQ's arguments including that Law 20 could be saved under section 1 of the *Charter*.

On the PGQ's first argument, the court held:

*The Court considers that the existence of constitutional guarantees **does not imply a distinction between a right or privilege**, such as that constitutional protection applies to police officers in uniform. (Emphasis added.)*

On the PGQ's second argument, the court held:

The appeal relates to a negative right, it being understood that police officers request not to be subject to provisions prohibiting them from any substitution or alteration of the uniform, restricting their freedom of expression..."[5]

Further, the Law also contravenes, in a substantial way, their freedom of association because they prohibit collective activities which imply the affirmation and autonomy of police officers in concerted action, as well as raising public awareness of their demands, i.e collective objectives essential to the true process of collective negotiation.[6]

Regarding section 1 of the *Charter*, while Law 20 had a substantial and pressing objective to maintain public confidence and safety in a police officer, and a rational connection to its purpose, the court held the law did not minimally impair a police officer's rights as it required "no substitutions or alterations of any kind." In the absence of the right to strike, Law 20 therefore took away a police officer's only other meaningful way of drawing attention to ongoing negotiation issues.

Finally, the court held the effect of the law was disproportionately detrimental to the freedom of expression and freedom of association of a police officer,

compared to any advantage the law may have brought.

As of the date this article was prepared, the Attorney General of Quebec does not appear to have appealed the decision. We will keep our readers posted.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

Footnotes

[1] See for example, Nova Scotia's – *Trade Union Act*, 1994, c.475, s 52A(1) and New Brunswick's – *Industrial Relations Act*, RSNB 1973, c I-4, s 91(5).

[2] "CTV Montreal: Montreal Police to wear red caps and camouflage pants"; CBC News: "Police Force Dons Cowboy Costumes as Protest"

[3] 19-2 Television Show (2016 – "Protest Pants")

[4] *Federation of Municipal Police Officers of Quebec c. Attorney General of Quebec*, 2023 QCCS 333 at para 33

[5] *Federation of Municipal Police Officers of Quebec*, *supra* note 4 at para 12.

[6] *Ibid* at para 13.