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LABOUR AND EMPLOYMENT LAW ALERT

Borden Ladner Gervais

SUPREME COURT OF CANADA LANDMARK DECISION: THE RIGHT TO STRIKE IS NOW CONSTITUTIONALLY PROTECTED

Last week, the Supreme Court of Canada issued a landmark decision, holding that the right to strike is constitutionally protected.

In *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, the Supreme Court found that *The Public Service Essential Services Act - "PSESA"*, which created an absolute ban on the right to strike for unilaterally designated "essential service employees", infringed on protected *Charter* rights.

The *PSESA* is Saskatchewan's first statutory scheme to limit the ability of public sector employees who perform essential services to strike. It comes on the heels of a recent history of the withdrawal of services by public sector employees in the areas of health care, highway maintenance, snow plow operations, and corrections work, sparking major concerns about public safety. It prohibits the designated "essential service employees" from participating in any strike action against their employers.

In 2008, the trial judge concluded that the prohibition on the right to strike in the *PSESA* infringes on a fundamental freedom protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Subsequently, the Saskatchewan Court of Appeal unanimously allowed an appeal by the Government of Saskatchewan, stating that the jurisprudence did not warrant a ruling that the right to strike is constitutionally protected by s. 2(d) of the *Charter*.

Justice Abella, writing for the majority of the Supreme Court, agreed with the trial judge. The Supreme Court held that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The Court also determined that the means chosen by the Saskatchewan government to meet its objectives were not justified under s. 1 of the *Charter*.

Constitutionalizing the Right to Strike

Relying on history, jurisprudence and Canada's international obligations, the Supreme Court found that the right to strike is an indispensable component of participating meaningfully in the pursuit of collective workplace goals.

The Supreme Court emphasized the importance of the right to strike to promoting equality in the bargaining process. The Supreme Court recognized the deep inequalities that structure the relationship between employers and employees. It is the possibility of strike action that enables vulnerable workers to negotiate with employers on terms of "approximate equality" in the context of a fundamental power imbalance. In the Court's view, resorting to strike action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives. While a strike on its own does not guarantee the resolution of a labour dispute, the Supreme Court stated that strike action has the potential to place pressure on both sides to engage in good faith negotiations.

PSESA is not Justified Under Section 1 of the Charter

The Supreme Court found that, while the maintenance of essential public services is a pressing and substantial objective, the means chosen by the government in the *PSESA* are neither minimally impairing nor proportionate. The ban on the right to strike substantially interferes with the rights of public sector employees and cannot be saved by s.1 of the *Charter*.

The Supreme Court held that the *PSESA* goes beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

First, the *PSESA* grants unilateral authority to public employers to determine whether and how essential services are to be maintained during a work stoppage without any adequate review mechanism. This authority includes the power to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and the essential services to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. Simply, the *PSESA* has no adequate review mechanism for the determination of the maintenance of essential services during a strike. Also, the *PSESA* does not tailor an employee's responsibilities during a work stoppage to the performance of essential services alone. The Supreme Court found that requiring employees to perform both essential and non-essential work during a strike undercuts their ability to meaningfully participate in the process of collective bargaining.

In addition, the *PSESA* lacks access to a meaningful alternative mechanism to resolve bargaining impasses, such as arbitration. In essence, the Supreme Court held that a ban on the right to strike must be accompanied by a meaningful mechanism for dispute resolution by a third party. Quoting the trial judge's remarks, it was noted that no other essential services legislation in Canada is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential services employees. In fact, "no strike" legislations are almost always accompanied by an independent dispute resolution process which acts as a "*safety valve against an explosive buildup of unresolved labour relations tensions*".

In conclusion, the Supreme Court held that the *PSESA* impairs the freedom of association much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

The *PSESA* was declared unconstitutional but the declaration of invalidity was suspended for one year. This should provide time to the Saskatchewan government to review its legislation.

Constitutionality of Amendments to the Certification Process

In the same judgment, the Supreme Court examined whether amendments to the Saskatchewan *Trade Union Act*, which introduced stricter requirements for a union to be certified, are constitutional.

The amendments included an increase in the required level of written support for union certification (from 25% to 45%); the elimination of automatic certification with 50% employee written support; a reduction in the period for receiving written support from employees from six months to three; a reduction in the level of advanced written support needed for decertification. These changes also broaden the scope of permissible employer communications to include facts and opinions.

The Supreme Court dismissed the constitutional challenge against these amendments. Although it has long been recognized that the freedom of association protects the right to join associations of the employees' choosing, the amendments do not substantially interfere with that right. Compared to other Canadian labour relations statutory schemes, these requirements were found not to constitute an excessively difficult threshold such that the employees' right would be substantially interfered with.

In respect of employer communications, the Supreme Court found that permitting an employer to communicate facts and its opinions to its employees is not an unacceptable balance as long as the communication does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.

Effect of Supreme Court Ruling

This judgment represents continuity in the Supreme Court's reversal of its thirty-year old precedents which had found no constitutional right to collectively bargain or to strike. In January, the Supreme Court ruled that the federal government violated the *Charter* by denying the RCMP officers the right to unionize.

Notably, a strong dissent by Justices Rothstein and Wagner expressed the view that the Supreme Court should not intrude into the role of policy makers in fundamental matters of labour relations. For the dissenting judges, the constitutionalization of the right to strike upsets the delicate balance that has been struck by legislatures between the interests of employers, employees and the public.

Although this judgment represents a significant development in labour law, it is not likely to have dramatic impact for private sector employers in the absence of some government action. However, special legislation directed towards private sector employers (such as back-to-work legislation) will have to be carefully crafted to provide for third party dispute resolution mechanisms to resolve bargaining impasses and as necessary, to determine or challenge essential services designations.

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