Supreme Court Of Canada Decision On The Right To Strike Could Have An Impact On The Education Sector

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On January 30, 2015, the Supreme Court of Canada issued a landmark decision, holding that the right to strike is constitutionally protected. This recent decision could have a significant impact on the education sector.

In Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4, the Supreme Court found that the Public Service Essential Services Act (the "*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 section 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 section 2(d) of the *Charter*. Justice Abella, writing for the majority of the Supreme Court (and a former head of the Ontario Labour Relations Board), 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 section 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 in 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 section 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 for 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; and 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 2015, the Supreme Court ruled that the federal government violated the Charter by denying the RCMP officers the right to unionize.1

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.

Significance to Education Sector

The Supreme Court's decision may have an impact in ongoing negotiations with education sector unions, particularly in Ontario where the government passed new legislation, the *School* Boards Collective Bargaining Act, 2014 in April 2014 (the "*SBCA*"). The SBCA was intended to create the framework for two-tiered bargaining with

teacher and other education sector unions in Ontario, with roles for the province, school boards and unions.

The Supreme Court's strong stance against back-to-work legislation enacted by the Saskatchewan government may impact a possible strike by teacher or other education sector unions in current negotiations. The Ontario Secondary School Teachers' Federation ("*OSSTF*") publicly announced a strike fund in June 20142, and the Elementary Teachers' Federation of Ontario ("*ETFO*") announced a strike vote in December 20143. Given the tension in the current bargaining environment, the Ontario government may soon be facing labour disruption in the education sector, and public pressure to end (or avoid) such disruption.

In order to comply with the Supreme Court's decision and the *Charter*, any back-to-work legislation would have to be carefully drafted to include a "meaningful dispute resolution mechanism" commonly used in labour relations. There are dispute resolution mechanisms and provisions relating to strikes in the SBCA, however this legislation was drafted before the release of the Supreme Court's decision, and may need to be re-examined.

In addition, the Supreme Court's decision is highly relevant to the ongoing constitutional challenge

The Supreme Court's strong stance against back-to-work legislation enacted by the Saskatchewan government may impact a possible strike by teacher or other education sector unions in against the Putting Students First Act, 2012 (the "*PSFA*") by the OSSTF and the *ETFO*. The PSFA imposed two-year contracts between teacher and other education sector unions and school boards from September 1, 2012 to August 31, 2014, and limited the right to strike. The preamble to the PSFA states that the "public interest" required adopting the contracts and limits on the right to strike on an "exceptional and temporary basis" in order to "encourage responsible bargaining" and to ensure contracts contained "appropriate restraints on compensation." Although the PSFA was repealed on January 23, 2013, it has had significant ongoing effects on collective bargaining and contract provisions.

The teachers' unions assert that the PSFA violates subsection 2(d) of the *Charter*. The hearing of this Charter challenge by the Ontario Superior Court of Justice was delayed in 2014 pending the decisions of the Supreme Court in the PSESA and RCMP cases.4 If the Ontario Superior Court decides the PSFA was unconstitutional, it remains to be seen what remedies would be ordered; the collective agreements imposed under the PSFA terminated on August 31, 2014.

1 2015 SCC 1.

2 Kate Hammer and Caroline Alphonso, "Ontario teachers to receive three-quarters of pay in case of strike", The Globe and Mail (June 9, 2014).

3 ETFO Bulletin, "ETFO Members Vote 95 Percent in Favour of Central Strike Action", December 9, 2014 online: <http://www.etfo.ca/ MediaRoom/MediaReleases.aspx>.

4 OSSTF District 20 Teachers' Bulletin, "Supreme Court Cases Delay OSSTF's Bill 115 Challenge" (March 25, 2014): Online <http://www.osstfd20.ca/PDFs/Newsletters/News-March-2014.pdf>.

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