LEGAL UPDATE

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CONSTITUTIONAL RIGHT TO STRIKE

The Supreme Court of Canada ruled Friday that the right to strike is an essential part of a meaning full collective bargaining process and is constitutionally protected under section 2(d) [Freedom of Association] of the Charter.

HOW DOES THIS IMPACT ME?

This is the third Supreme Court of Canada decision in the last two weeks (see Legal Update Vo. 1) that expands on the Charter's protection in the Section 2(d) right to freedom of association in the labour context. In a 5:2 decision the Court struck down a Saskatchewan law, the *Public Service Essential Services Act,* finding that the freedom of association protects the right to strike. The declaration of a constitutional right to strike and the expanded approach to section 2(d) taken by the SCC in recent earlier cases could affect labour laws across the country, particularly those governing the conduct and resolution of collective bargaining disputes.

SASKATCHEWAN FEDERATION OF LABOUR V. SASKATCHEWAN

This case arose out of labour law changes made in Saskatchewan in 2008 with the enactment of the *Public Service Essential Services Act (PSESA)* and the *Trade Union Amendment Act.* The *PSESA* defined essential services as any work whose absence might create a "danger to life, health or safety; the destruction or serious deterioration of machinery, equipment or premises, serious environmental damage, or disruption of the courts". The legislation declared essential all workers in public service, Crown corporations, Regional Health Authorities, Municipalities, Universities of Saskatchewan and Regina, Saskatchewan Institute of Applied Science and Technology, Police, and "any other person, agency or body, or class of persons, that provides an essential service to the public". Under the PSESA, designated essential services employees were prohibited from participating in any work stoppage against their public employers. The

PSESA required negotiation between a public employer and union to govern how essential services were to be maintained in the event of a work stoppage. In the event that the negotiations broke down, it allowed employers to unilaterally select which employees were essential. The Saskatchewan Labour Relations Board had no authority to review whether any particular service was essential, whether any classifications involved the delivery of genuinely essential services or whether specific employees named by the employer to work during a strike were reasonably selected.

The *Trade Union Amendment Act* changed the union certification process by increasing the necessary written support level from 25% to 45%, eliminating automatic certification, reducing the time for written support from employees and changing the law around employer-employee communications.

Justice Abella, writing for the majority, held that the essential services scheme in the *PSESA* was not minimally impairing "given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate impartial and effective alternative mechanism for resolving collective bargaining disputes". The majority determined that the *PSESA's* unilateral withdrawal of the right to strike "amounts to a substantial interference with their right to a meaningful process of collective bargaining" and was, therefore, unconstitutional. Speaking for the majority Justice Abella provided the following:

> *...Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d). As the trial judge observed, without the right to strike, "a constitutional right to bargain collectively is meaningless.*
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> *Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would be more likely justified under s. 1 of the Charter. In my view, the failure of any such mechanism in the PSESA is what ultimately renders its limitations constitutionally impermissible.*

While the majority decision strongly endorsed the right to strike, there was also a strong dissent from Justices Rothstein and Wagner who opined that the majority was wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike. In their view the statutory right to strike, along with other statutory protections for workers reflects a complex balance struck by legislatures between the interests of employers, employees and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained.

The Court found that the Trade Union Amendment Act did not infringe the right to freedom of association.

WHAT IS NEXT?

The Court has suspended its declaration to give Saskatchewan one year to enact new legislation. The Court does not suggest that government cannot create essential services legislation and, in fact, was clear that the designations of essential services are "fundamental question" to be addressed by government. However, according to the Court, its decisions in *Health Services* [2007] 2 S.CR 391, *Fraser* [2011] 2 S.C.R. 3 and *Mounted Police* [2015] SCC 1 that freedom of expression protects a meaningful process of collective bargaining reinforce the notion that the "judicial arc" is bending "increasingly towards workplace justice." The declaration of a constitutional right to strike and the expanded approach to section 2(d) taken by the Court in the earlier cases could affect labour laws across the country, particularly those governing the conduct and resolution of collective bargaining disputes.

QUESTIONS?

If you have any comments or questions about this update please contact Karen Jewell, Program Manager at 604-432-6228 or by email at Karen.jewell@metrovancouver.org.

SOURCES

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 (Lexum), <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14610/index.do> retrieved on 2015-01-30.